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tions.

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A
TREATISE
OF
Common Recoveries,
THEIR
NATURE and USE.

To which is added

The CASE of *Page* and *Hayward*
more fully Reported than in any
other Book extant :

AND ALSO

A CASE between the late Earl of *Derby*
and the Coheirs of his Elder Brother.

WITH

Precedents for Amending Recoveries :
And a Complete TABLE to the Whole.

By *N. PIGOTT*, Esq; late a Barrister of
the *Inner Temple*.

*Non mihi Soli Laboravi, sed omnibus
Exquirentibus Scientiam.*

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of
E. Sayer, Esq;) for *J. Shuckburgh*, at the Sun near the
Inner Temple Gate in *Fleet-street*. M DCC XXXIX.

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Page 2. after the word 'agnati'.

From the mention here made of the agnati, the reader may be led to suppose
resemblance between them & our heirs in tail. But in fact I cannot find
any foundation for comparing the two together. The preference given
the law of the twelve tables to the agnati ^{in relation to the inheritance}
is ^{the exclusion of the cognati,} ^{in priority to those who are the parties of the matter,} only took place
in case of intestacy & a want of legal heirs. ^{a branch of which}
whereas ^{in our law} ^{the preference} ^{is given to the agnati} ^{in case of intestacy} ^{and a want of legal heirs}
it like preference is given by our law, which calls ^{collateral} ^{of a purchasing an}
inheritance of lands all the paternal relations, before those
the maternal line. Herein then our law & that of the twelve
appear in some measure to ^{agree,} ^{both laws} ^{preferring} ^{the inheritance to the} ^{male}
heirs. But the case of estates tail is very different. There the order
of succession is, what ^{over} ^{the donor} ^{pleases to make the} ^{succession}
is improper therefore to consider the agnati of the ^{Direct} ^{as bearing any resemblance} ^{advanced} ^{to the succession by}
our heirs in tail; the latter being ^{called} ^{to the succession by}
will of the person who creates the estate tail, whereas the
succession to the inheritance ^{is made} ^{in accordance with the preference of the inheritance by the}
favor of the law in cases where the last owner of the estate
had omitted to ^{himself} ^{prescribe the order} ^{of succession.} By what
it is not intended to intimate, that the agnati of the
are ^{the same persons as} ^{in our law} ^{those whom we call} ^{paternal relations.} The
relations have a very different meaning; the
~~all relations only such relations as are descended from male~~
~~relations - the paternal relations only - and the paternal relations only~~

². may be seen by turning to Heirec. antiq. p.
lib. 3. tit. 2: where the reader will find a very learned
treatment of the succession of the agnati.

A
TREATISE
O F

Common Recoveries.

CAPUT I.

**Of the Origin, Nature and Use
of Common Recoveries.**

28. **A** Common Recovery is a certain Definition of
Form or Course allow'd by Law a Common
to be observed for the better Af- Recovery.
surance of Lands, and generally used
for the barring Estates Tail, Remainders
and Reversions. I cannot say this is

B

an

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an exact logical Definition, but rather a Description, as all legal Definitions are, for *omnis definitio in Lege periculosa*.

Common Recoveries being now generally used to bar Estates Tail, it may not be amiss to look into the Origin of Estates Tail, which our Ancestors have been so fond of, and which by Experience, have been found to have created many Inconveniencies to the Commonwealth.

The Origin of
Estates Tail.

Littleton tells us, that an Estate Tail is a limited Estate, wherein the Donor in his Gift expresses what Sort of Heirs shall inherit; so the Law co-operating with the Donor's Intention, makes the Estate Tail. These Estates are not, by this Name, found in any antient Writers; for the Law of the twelve Tables makes no Mention of them, yet that Law calls the *Agnati* to inherit; and in the *Media Juris-prudentia* there were Institutions and Substitutions like our Remainders; and the Civil Law had

In coming the agnati, see
Quintus. Syntagma. l. 1. c. 1.
l. 3. c. 2. & as to
the Institutions & Substi-
tutions in use among
the Romans, see the
same book l. 2. c. 14 & 15.

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had a greater Regard to the Male than Female Line, till the Emperor *Justinian*, in his Novels, put both on an equal Footing.

The *Jewish* Law, which is the most antient written Law, takes no Notice of these Sort of Estates: Indeed, the Daughter of *Zetophe* had, on the Failure of Issue Male of their Family, claimed the Inheritance, which shews, as long as there were Sons, the Daughters did not inherit; but the Succession among the *Jews* was generally the same as the antient *Romans*. It is therefore to be inquired, if these Estates Tail had not their Origin from the Feodal Law: And it is probable they had; since that Law admits no Female Succession, I mean in its Purity, before the *Feodum Feminium* was introduced; and by that Law, as used in *England*, the eldest Son took the Estate, and it always went according to the Tenor of the Investiture or Grant, which is the

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very same as our Estates Tail, where the *Voluntas Donationis*, is the Rule and Measure of the Estate; and as the Conqueror introduced Military Services into this Kingdom, which arose from the Feodal Law which was in Use in *Normandy*, long before the Conquest; so this insensibly carried the Estate to the eldest Son, and occasioned the Statute of Entails: For before the Conquest, by the *British* Law, all the Sons inherited, and so was the Law in *Wales* in *Edward* the First's Time. *Nam aliter iustatum est in Wallia quam in Anglia quoad Successionem hereditatis, eo quod hereditas in Wallia partibilis sit int' heredes Masculos*: And my Lord *Hale* is of Opinion, that till King *John*'s Time, the hereditary Succession to the eldest Son, was not settled. But this must be understood of Socage Land; for from the Conqueror's Time, the Feodal Tenures of Knights-Service were introduced, and there the eldest Son inherited;

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herited; and this held till the Statute *De Donis*, when the Lords and great Men being fond of perpetuating their Names, and handing down their Estates to their Families, by that Statute, created these Estates Tail.

At Common Law all Estates were Fee-simple, Absolute or Conditional, *see Wrighton.* which created a wonderful Quiet and 106. Repose to the Publick; but when this Family-Law was introduced, and these fetter'd Inheritances establish'd, it is not to be imagin'd what Suits, Troubles and Disputes they created; as indeed it always happens when the Grounds of the antient Common Law of this Kingdom are alter'd. And the Reason is obvious, for the Common Law of *England* having its Force from immemorial Custom; and, as my Lord *Coke* observes, being refined by the Experience of many Ages, its Goodness is found by its Use; but when this excellent Constitution is alter'd by a positive

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fitive Law, though the Change has a gay Outside, yet Time shews the Inconveniencies of the Alteration; and the Legislature having only a present Conveniency in View, the new Law, when used, manifests that what was intended profitable, proves often Destructive, and so it fell out in making the Statute of *Donis*, which created Estates Tail, turning all those Estates which were Fee-simple at Common Law, into those Curtail'd Estates, which being of an amphibious Nature, and participating so much of a Fee as to be Inheritances, and yet Tenant in Tail in some Respects, having only an Estate for Life, this odd Mixture created infinite Difficulties, not foreseen, but experimentally found to be very troublesome to the Quiet of the State.

These Estates being thus made by the Statute of *Westminster* the 2d, had various Fates, every Age looking on them with a different Aspect. 5 *Ed.* 3, 14.

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They were by *Herle* said to be sage Gentlemen that made this Act; and tho' the Statute *De modo levandi Fines*, was a most excellent Law, yet the Statute of *Westm. 2.* having provided *Quod Finis ipso Jure sit nullus*, the Judges construed a Fine levied by Tenant in Tail, a Discontinuance, but no Bar; so that for 200 Years these Estates were favour'd; and the Nobility being always fond of this Act, by Reason it preserved their Estates for their Family against Forfeitures, even of Felony and Treason, there was no Hopes of getting it repealed by the Legislature; and therefore the Judges were forced to use their Art by Construction, to avoid this Act, and remedy the intollerable Inconveniencies introduced by it. *Vide Moore* 156.

It is true, *prætoris est Jus dicere non Condere*, and this altering the Law, and evading the Statute of *Westm. 2.* seems to be a taking away the Force of a positive

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sive Law without the Legislative Power; but Use and Custom have given Common Recoveries a Sanction, and the Judges will not now let them be shaken or reflected on.

The Origin of
Common Re-
coveries.

The Origin of Common Recoveries, and the Occasion of introducing them has been much controverted among the Learned; and some are of Opinion that *Edw. 4.* seeing the great Effusion of Blood in the unhappy Disputes between the Houses of *York* and *Lancaster*; and finding, that tho' he used the Extremity of Law against the opposite Party, by attainting them of High Treason, yet their Estates were protected in the Sanctuary of Entails, and the Son who succeeded the Father, generally inherited his Principles and Party as well as Estate. To remedy this, and to give People an Opportunity to Dock their Estates, this wise Prince brought *Taltarum's* Case on the Stage, in the twelfth Year of his Reign, as King

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James I. did *Calvin's Case*, and King
James II. *Edward Hale's Case*, where
the judicial Decision was made Auxilia-
ry to the *Police*. However it was, it
must be owned *Taltarum's Case* was
cunningly managed, for *Prima Facie*,
that seems to be an adverse Judgment,
and the Opinion of the Court was for
the Issue in Tail, against the Recovery.
The Case was this, Tenant in Tail Ge-
neral, makes a Feoffment in Fee, and
takes back an Estate to him and his
Wife, and the Heirs of their Bodies,
and the Wife dies, a *Præcipe* is brought
against Tenant in Tail, and he vouches
the Common Vouchee, and held that
Estate Tail was not barred, because
Tenant in Tail was seized of another
Estate, and the Recovery in Value,
which is the Reason of barring the Issue,
goes according to the Estate whereof
the Tenant was seized at the Time of
the Recovery, and not in Recompence
of the Estate he had not, so that here

The Recovery
in Value,
which is the
Reason of bar-
ring the Issue,
goes according
to the Estate
Tenant in Tail
was possessed
of.

C

Tenant

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Tenant in Tail being in of a Special Estate Tail, the first Estate Tail was not barred. But by what was said by the Bench in this Case, it appears, the Judges were of Opinion, that if in this Case Tenant in Tail had come in as Vouchee, he had then come in of all Estates he ever had, though discontinued and turned to a Right; so that from this Case, 12 *Edw.* 4. 14, 19. most date the *Æra* of Common Recoveries. But it seems to others that they are of far greater Antiquity; for when the Judges saw the ill Consequences these fetter'd Estates introduced, and that they look'd towards a Perpetuity, they always endeavoured to lessen their Authority. And my Lord Coke in *Mary Portington's Case*, 10 *R.* 37. 6. cites several Cases that from *Edw.* III.'s Time the Judges were of Opinion that a Common Recovery was a good Bar to an Estate Tail. And the Rise of them seems to be from *Octavian Lombard's Case*, 44 *E.* 3. 21. The

For the Reason of the Law, *vide* *Shore* 373.

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The Case was, *Octavian Lombard* brought a Replevin for taking his Cattle, the Defendant avows, for that one *Nicholas* was seized in Tail, and had Issue *John* and *Joan*; *Nicholas* dies, *John* being then beyond Sea, *Joan* the Daughter enters, and has Issue *Nicholas*, who enters; *John* the Son returns from beyond Sea, and sues for the Land, and on an Agreement, releases to *Nicholas*, and for this Release *Nicholas* grants him 20^l. a Year, with a Clause of Distress, and for Rent Arrear avows on the Land charged, then in the Hands of the Issue of *Nicholas*, and the Distress held good. Now the Gift of this Case is, Tenant in Tail *pro Lite redimenda*, grants to one that had a prior Right to the Estate a Rent-charge, in Consideration of a Release of his Right, this being for the Benefit of the Issue, held he could not avoid it. From this Ground it seems Common Recoveries had their Origin; for the Issue in all Common Recoveries

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is supposed to have a Recompence in Value for the Estate lost, and this Recompence in Value is the Reason of his being barred. *T. 7 Edw. 4. 19. Pl. 25.* Indeed it may be reasonably objected that this is all Supposal, since it is notorious that in Reality, the Issue on a Common Recovery has no Recompence, and this is all a Fiction of Law. That is true, but *in Fictione Jure subsistit Equitas*; and all Laws have their Fictions, and all grounded on Reason. However, it must be owned, that this occasioned very hard Censures on Common Recoveries by the Learned; see Sir Thomas Craigg's, *De Feodis* 161. says, *Et licet ex Jure Anglorum provideri in Feodo Taliato possit, ne in fraudem heredum qui in Tallio succedere deberet, Alienatio fiat qui tamen in foro versantur, callidis artibus mentem Legis subvertunt, & ex Illicito licitum per ambages faciunt, dum quod Vassallus alienare non potest, propter Conditionem in feodo Talliato expressam, id ei collu-*

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colludenti five Consentienti, simulatus contradictor (Revera autem Feodi Emptor) ex tacito consensu Judicio Feodum evincit, illi Recuperationem vocant. But let the Opinions of others be what they will of Common Recoveries, the Publick has found the Benefit of them, and being now Common Assurances, the Judges, (as my Lord *Hobart* on another Occasion says) are even *Astuti* in supporting them and inventing Reasons to maintain their Authority. Hence it is, that for several Centuries the sole Reason given for Common Recoveries was the Recompence in Value the Issue had, or by Possibility might have. But in Process of Time it happen'd that there were many Cases wherein the Issue or Party barred, could have no Possibility of Recompence; as if there be Tenant in Tail, Remainder for Years; if Tenant in Tail suffers a Recovery, the Remainder is barr'd, tho' no Recompence in Value can extend to a Term
which

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which is but a Chattel. So if a Feme Covert and her Husband are vouched, she is barr'd, tho' the Recompence extends not to her; so contingent Estates are barr'd without a Recompence. And therefore the Judges have been of Opinion, that the Recompence in Value is indeed the true Reason for barring the Issue in Tail, but no Reason for barring the Reversion or Remainder; but the Reason why they are barred is, that the Recoveror is by Supposition of Law, in of the Estate Tail, and that Estate Tail, by like Supposition of Law, continues for ever. And at Common Law the *Donee post prolem suscitata* might have alien'd and have barr'd the Donor; so these Common Recoveries were Conveyances excepted out of the Statute of *Donis*, and is a Privilege inherent, and annexed to the Estate Tail, and not taken away by that Statute. And the Recoveror being in of the Estate the Donee had, and the Estate
Tail

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Tail continuing in Judgment of Law, he in Remainder is so barr'd that no Charge by him can ever take Place.

There is another Objection made against Common Recoveries, which is, that when the Tenant appears and vouches to Warranty, that it is notorious here was never any Warranty among them, it being all a Fiction and Invention to bar the Entail. But as to this it must be observed, that whenever Tenant in Tail is vouched, he comes in of the same Possession he had before, and to warrant this Possession; for when a Man is vouched to warrant, and enters into Warranty, the Law presumes he parted with the first Possession with Warranty, and comes now to warrant it, pursuant to this Warranty; and that if it were otherwise, he would not enter into the Warranty, but counterplead it, and demand the Lien or Ground on which the Tenant founds his Warranty; but if without demand-
1 ding

ding the Lien he enters into Warranty, none can say he never warranted ; for the Tenant cannot say the Vouchee never gave him a Warranty, because the Vouchee has entred into Warranty ; and the Vouchee cannot say he never warranted, because his entring into Warranty is an Estople by Record, which binds him and his Heirs : So none privy to the Record can deny it, nor can any Stranger gain-say it, because the Law will always presume, when any one enters into Warranty, that there was a Warranty by Feoffment or Grant of such an Estate as he who is vouched had before ; and this is *Presumptio Juris*, and grounded on Reason ; for being to the Vouchee's Prejudice, and he binding himself to render the Value of the Land in Demand, the Law will not presume he would thus Prejudice himself, unless he had warranted.

The Objections against Common Recoveries being cleared, we are now to consider

*Besides the arguments
used by the author to sup-
port comon. recov. the
tacit confirmation
of them by several
acts of parl.
is proper to
be mentioned. see post p. 19. 2*

The Nature
and Use of
Common Re-
coveries.

consider their Nature and Use. As to their Nature, they are in many Things like Recoveries on Title, and for this Reason in every Common Recovery there must be a Demandant and Tenant, and the Tenant being, as has been said before, presumed to have a Warranty, calls in his Warrantor, who is Vouchee, and he vouches over the Common Vouchee, and Judgments are given just as in adversary Suits, wherein there is a Voucher. And the Land being recovered by him that brought the Writ, the Tenant is left to his Remedy over, against him that made Default, and came not according to his Warranty to defend the Tenant, and so has Judgment over, against him to recover in Value, and by this Means the Estate Tail, that was made by the Tenant or his Ancestors, is barred ; for that it is pretended he had now no Power to intail the Land whereunto he had no just Title, as now appears by the Recovery, the Land being evicted

D

and

and recovered from him. And though thus far Common Recoveries agree with Recoveries on Title, yet in other Things they differ; for a Recovery on a Title cannot be to an Use; but a Common Recovery being a Common Assurance, is always either to the Uses declared, or to the Uses the Land was before. There is likewise a Difference between a Recovery and a Fine; for a Fine proves a Right in him that levies it, but a Common Recovery disapproves and disaffirms all Title of him against whom it is had, *Popham* 23, and this so strongly, that if there be three or four Discents cast after the Recovery suffered, the Recoveror may enter, for the Recovery binds the Blood, and disapproves the Title. 6 Edw. 4: 11. Be-

† This stat. makes common Recovery ag^t ten^t for life withⁿ assent of him in remⁿ or resⁿ or D. It was repealed by the 14. of Eliz: c. 1. which ^{seems to} enact to the same thing, but int^rms more effectual as I presume from repeal of the former statute, though this is but conjecture, as the former statute is not printed. - This conjecture is confirmed by the next page.

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mainder; so if after the Stat. 32 H. 8. and before the Stat. 14 Eliz. Tenant for Life had let for Years to one who made a Feoffment, and a *Præcipe* had been brought against the Feoffee, and he had vouched Tenant for Life, this had bound the Remainder; but the Stat. 14 Eliz. cap. 8. helps it. 10 R. 43. 3 Cro. 562. Moore Pl. 955. Coke's Entr. Pl. 7.

It must not be omitted that several Statutes, as well as 32 H. 8. and 14 El. have call'd these Common Recoveries Feigned Recoveries, and seemed to cast a Reflection on them; but that in Reality was only a Reflection upon the Abuse of Common Recoveries. But on the other Hand, 7 H. 8. c. 4. allows them, and enacts, Recoverors may avow without Attornment. 10 R. 37, 38. Dr. and Student 88. which shews they were lawful; for it is not to be presumed the Legislature would give any

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Countenance or Remedy to Things illegal.

As to the Use of Common Recoveries, they were invented and are used to bar Estates Tail and Remainders, and Reversions expectant on them, and to reduce all Estates to that Purity and Condition they were in at Common Law, and to avoid, as much as may be, the Inconveniencies the Statutes of *Donis* brought into the Commonwealth, since without these Recoveries, as my Lord *Coke* observes, Tenant in Tail can make no Jointure for a Wife, Provision for his Children, or Payment of his Debts.

The Origin, Nature and Use of Common Recoveries being shewn, I shall here Recapitulate some Observations made before, and set forth what Cases occur in the Books in this Matter.

First, a Common Recovery, by Tenant in Tail, bars the Estate Tail, and
all

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all Remainders and Reversions thereon expectant; for at Common Law, that which is now an Estate Tail being a Conditional Fee, no Remainder could be after a Conditional Fee; for a Fee, by the Rules of Law, cannot mount on a Fee. Now, though the Statute of *Donis* turns this Conditional Fee into an Estate Tail, yet a Recovery, as has been observed before, was an inherent Privilege not taken away by that Statute, and it is a Conveyance excepted out of that Statute by Construction of Law; and for this Reason, he who comes in under Tenant in Tail, is liable to all his Charges; for the Recoveror comes in, in Continuance of the Estate Tail, for the Recovery enlarges the Estate Tail, which, by Supposition of Law, has a perpetual Continuance.

Shore 377.

2 Lev. 29. 1 Mod. 110, 111. Sid. 285.

3 Keb. 289. And this is the true Reason why the Remainders and Reversions are barred; but the Reason why the

2

Issue

In consequence of this opinion, that it has been held in the house of lords, that if tenant in tail of an estate separate make a common recovery, the estate shall not go to the issue, but shall go in the maternal line. But see 2. Stra. 1179.

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Issue is barr'd by a Common Recovery, is the intended Recompence, 2 *Lev.* 30. and this Recompence is regarded in Law, and though in Reality there is none, yet the Law supposes a Recompence, and for this Reason the Issue is never barr'd without a Recompence or a Possibility of one; for which Reason if Tenant in Tail makes a Feoffment in Fee, and a *Præcipe* is brought against the Feoffee, who vouches Tenant in Tail, and he vouches the Common Vouchee, this bars the Estate Tail, because Tenant in Tail coming in as Vouchee, he shall be in the Degree of Tenant in Tail, and the Recompence in Value he has, or by Possibility may have, goes to the Estate Tail, and when he comes in as Vouchee, he comes in of all Estates he ever had. But if in this Case, if Feoffee had re-enseoffed Tenant in Tail, and the *Præcipe* had been brought against Tenant in Tail, and he had vouched the Common Vouchee,

chee, there Tenant in Tail not being seized of the Estate Tail, but of another Estate, there the Issue is not barr'd, because the Recovery in Value goes according to the Estate whereof he was seized, and in Possession at the Time of the Recovery, and not in Recompence of the Estate he had not; it is true, as has been said before, the Vouchee in the first Case may demand the Lien, and then shall only be barr'd of that Estate to which the Warranty is annex'd; for the Recompence goes according to the Lien, but when Tenant in Tail comes in as Vouchee, and demands not the Lien, then he comes in of all Estates he ever had. *Plow. Maxwell's Case, 8. 14.* And this Rule of the Recompence in Value is so true, that when the Issue has no Recompence, he is not barr'd; as if there be a Recovery against Tenant in Tail and no Voucher, as by Default, and Tenant in Tail dies, the Issue is remitted, but

Mich. 19 Ed.

3. 51.

Hob. 26.

(N.B.) ~~demands re- quires the tenant to explain to what estate the~~

if he had vouched over, there had been no Remitter, because he has, or may have Assets, and if he should falsify, he would have the Estate Tail and Assets also: And it is a known Rule, that the Issue in Tail never can defeat any Act but what is to his Advantage; and if the Issue has Assets, or a Possibility of Assets, it is sufficient, and the Recovery in Value goes to him that loses the Tenancy, and *Formedon* lies for the Assets, and he has such Estate in the Assets as he lost. *Plow.* 514. a. And there is a very good Case to this Purpose 17 *Edw.* 2. 545, *J. Chamberlaine's Case*, which was this, Assize of Novel Disseizin by *B.* against *A.* and *J.* answers as Tenant, and vouches to Warranty *A.* who enters into the Warranty, and pleads with the Plaintiff, and Judgment is given that the Plaintiff shall recover against *J.* and he over, against *A.* and *J.* brings a Writ of Error to reverse this Judgment, and held that Error

Error does not lye, for *F.* is by the Judgment to recover against *A.* the Vouchee, who was Tenant, so *F.* had nothing to do with the Judgment, being at no Loss. And its there held, that Voucher in Affize is not like Voucher in other *Præcipe's*; for in other Writs, when Vouchee enters into Warranty, the Tenant is out of Court, and the Vouchee only Party to the Plea; but here he cannot lose but by Verdict of the Affize; and here, if the Tenant should reverse the Judgment, he will be restored to the Land lost, and have Recovery in Value also, and he who has the Loss must have Error, and that is the Vouchee, which shews how much Notice the Law takes both of the Loss and Recompence; but from this Case it must not be concluded that the Common Vouchee in a Common Recovery may have Error, for he is only a formal Party, and the Court takes Notice of it. *Hob. 28. 3 Cro. 2, 3.*

by the condition

*is for as concerning
defence of the title*

E

Secondly,

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Secondly, We must observe that these Common Recoveries are now become Common Assurances of Land, and therefore are favoured by the Judges, and the Intent of the Parties respected and supported as far as may be. 2 R. 74. 3 Rep. 3. 5 R. 20. 146. and a Fine, Recovery and Deed to lead the Use, are all but one Conveyance, tho' they have several Operations, which see well debated in Cromwell and Andrew's Case. 1 Cro. 15.

*There is nothing
concerning recovery
in this case.*

Thirdly, As to their common Use and Method, if the Tenant be in Court and the Vouchee, then there is no great Difficulty in the Matter, it is all done at the Bar; but if the Tenant be absent, then there must be a *Dedimus potestatem de Attorn' faciend' & tertio Sumons' ad Warrant'*; and then Care must be taken that all be regularly and carefully done. If there be Father Tenant for Life, Remainder to the Son in Tail, Remainder over, and a Recovery

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is to be suffer'd, it is safest to have a Recovery with treble Voucher; and let the Tenant to the *Præcipe* vouch the Father, and the Father the Son, and the Son the Common Vouchee; for by this Means, if the Father has any ancient Entail vested in him, he coming in as Vouchee, is barr'd, which would not be if the *Præcipe* was brought against the Father, and he vouched the Son. And the Party who is concern'd to look into a Recovery, is carefully to see if the Writ of Entry be duly filed, and the Proceedings regularly entred, and to have an Exemplification of the Recovery; for I have known some Attorneys so remiss as to take all the Fees for a Recovery, and barely take it at the Bar, and do nothing more.

La 14. G. 2. c. 20.

E 2

CAPUT

CAPUT II.

Of the Tenant to the *Præcipe*.

IN every real Suit there must be a Demandant and Tenant, the Demandant is the Party grieved, and who, in the Course of Justice demands a Reparation for the Tort done him. The Tenant is the Wrong-doer, and who with-holds the Land or other Thing demanded, so that though Common Recoveries are deem'd to some Intents fictitious, yet there must be *Actores fabule*, for which Reason there must be a Tenant to the *Præcipe*; that is, the Writ of Entry must be brought against one that is actually seized of the Freehold by Right or Wrong, or else the Recovery is void; for in every Real Action there must be a good Tenant to the Freehold, otherwise he cannot render the Land as the Writ commands; and though

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though the Tenant may plead Non-tenure, yet if he does not, the Issue in Tail is not barr'd, who may plead *Nient Tenant tempore brevis*, 12 Edw. 4. *Shore 347.*

12, 19. because the Issue is not estopped since he claims *Per formam Doni*, 3 R. Marquis of Winchester's Case. But if there be a good Tenant to the Pre-
cipe, before the Return of the Writ, it

is good; for even in adversary Writs, if the Tenant was not Tenant at the Teste of the Writ, but was before the Return, it was well. If he were not Tenant at the Return of the Writ, he might abate the Writ by pleading Non-tenure; but if in that Case he vouched over, then as to himself he admitted the Writ good; but then the Vouchee might counter-plead the Tenancy; but if the Vouchee does not counter-plead the Tenancy, it is good against them all by Estoppel. But in this Case the Tenant shall not Recover in Value, because he is at no Loss; but if he be-

2. Show. 347.

*1.2 as the tenant
Vouchee -*

*See 16.
Mod. 45.*

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come Tenant after the Voucher, and before Judgment is given, where the Vouchee is summon'd *ad Warrantizandum* by Writ, and appears at the Return, as in *Lacy* and *William's Case*. *Salk.* 568. Then the Judgment not being given on the *Præcipe*, but on the last Voucher, this Judgment binds the Land; so that when the Recoveror takes out Execution, the Tenant by a subsequent Purchase cannot avoid this, for the Tenant is become a Loser, and shall recover in Value against the Vouchee, and the Vouchee over. *Hut.* 112, 113. And if it be a Recompence by Estoppel, this concludes Parties and Privies, and is good to bar them. *Stiles* 319. Now if it be thus in Adversary Writs, much more in Common Recoveries; and therefore in Common Recoveries, if there be a good Tenant to the *Præcipe* any Time before Judgment, it is good, with this Diversity, that if the Tenant comes to the Land by his own Act,

Act, he can never plead it to abate the Demandant's Writ, but has thereby made the Writ good; but if he comes to the Land by Act of Law, he may abate the Writ by pleading Non-tenure.

As if a Son has a *Præcipe* brought against him in the Life of his Father, and his Father dies, he may plead Non-tenure, if the Land descended to him by his Father's Death. 1 H. 6. 12. 5 H. 5. 9, 8 Edw. 3. 82. 37 H. 6. 16. 3 H. 7. 8. 41 Edw. 3. 5.

There is another Reason why a Tenant to the *Præcipe* is necessary, *viz.* because the Estate Tail of the Vouchee is barr'd only in Respect of the Assets recovered, or which by Possibility may be recovered in Value: Now till the Demandant sues Execution against the Tenant to the *Præcipe*, the Tenant cannot have Execution against the Vouchee, nor the Vouchee against his Vouchee; and if the Tenant to the *Præcipe* had nothing in the Land, no Execution

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cution can be sued against him, and if no Execution can be sued against him, no Recovery can be had over in Value, and consequently no Recompence to bind him, and so the Recovery can be no Bar. And to inforce this, *Littleton*, in *Taltarum's Case* says, when there is no Tenant to the *Præcipe*, there is no Recovery, because there is none against whom the Demandant may recover the Land, and a Recovery proves not the Tenement seiz'd, but supposes it. *Plowden* in *Manxwell's Case*, elaborately urges this Point, and endeavours to prove that a Common Recovery may be good, where there is no Tenant to the *Præcipe*. Now all his Arguments seem to centre in this, that all Parties and Privies to the Recovery are estopped, to say there was no Tenant to the *Præcipe* against the Admittance on Record. But it is plain that Estoppels bind not the Issue in Tail; and the Law is now settled, that if there be no Tenant to the
the

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the *Præcipe*, the Common Recovery is void, and the Issue in Tail may falsify, that is, reverse it for this Error; for the Recovery in Value (as has been said before) goes to him that has the Loss, or loses the Tenancy; and he that loses may aver against a Stranger that he lost nothing, so shall recover nothing: And if so, *a fortiori*, the Issue in Tail, who comes paramount all Conclusions and Estoppels, may aver *Nient Tenement' tempore brevis*, 3 R. 5.

6. 60. a. 12 Edw. 4. 12. 19. Cro. Car. 309. Cro. El. 21. Moor 255. 4 Leon. 23. But if one that has a Remainder in Fee suffers a Common Recovery, it binds and estops his Heirs, though there is no Tenant to the *Præcipe*. Stiles 320. 2 Croke 21. and in a Writ of Right, a Recovery may be good without a Tenant to the

Præcipe, 1 Vent. 360. But in a *Warrantia Chartæ*, he who brings the Writ must be Tenant of the Land the Day of the Writ purchased; and it is a

F

good

2. the reason of this?

good Plea to say *Nient Tenement' Four del Brief*; so if one release with Warranty, he may vouch him that released; but it is a good Plea to say Releasee had nothing at the Time of the Release. *Hob. 21, 24.*

Though a Tenant to the *Præcipe* be so essentially necessary to a Common Recovery, yet if a Stranger who has nothing in the Land be added and made Tenant with him that is seized of the Land, it hurts not, for the Recompence in Value goes to him that lost the Estate. *1 Vent. 350.*

*See post
35-4179.*

Having shewed the Reason why a Tenant to the *Præcipe* is so absolutely necessary in a Common Recovery, I shall now set down the Cases that occur in the Books about this Matter, which will serve to illustrate this Point.

Lessee for another's Life, makes a Lease for sixty Years and dies, and he in Reversion, being Tenant in Tail, suffer'd a Common Recovery, and held

Erronious for want of a good Tenant to the *Præcipe*; for the Freehold was cast on Lessee for Years as Occupant, and so, he or some claiming under him, ought to have been Tenant to the *Præcipe*. 1 Keb. 735, 785.

This case happened

Husband makes a Feoffment to the s Rep. 6. Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs of their Bodies, and a *Præcipe* is brought against him and his Wife, and they vouch Common Vouchee, this bars not the Entail, for the Woman is not a proper Tenant to the *Præcipe*, for the Reasons that shall be hereafter declared: So if a Man be Tenant for Life, Remainder to B. in Tail, if a *Præcipe* be brought against both, this bars not the Entail; so of a *Præcipe* against Mortgagor and Mortgagee: And the Reason of all these Cases is, because the Land recovered in Value shall be in the same Degree as the Land lost; and when a Joint *Præcipe* is brought

the 2. L. Raym. 754. In all points

Quare, Be-
cause, though
this was for-
merly the bet-
ter Opinion,
yet now the
Reason comes
to hold, *quod*
vide in *Page's*
and *Hay-*
ward's Case.
2 *Salk.* 570.
Idem Quare

4 H. 176.

against Baron and Feme, Tenant for Life and him in Remainder, Morgagor and Mortgagee, it supposeth them to be Jointenants, and the Judgment must be against them as Jointenants, and the Recovery in Value according to the Action, whereupon he recovered, and so shall be the Execution, then the Recovery in Value being accordingly, it is in the same Degree the Estate Tail was, so no Bar to the Issue in Tail or Remainder, the Recovery being of a Joint-Estate. Further, the Cause of the Bar is, the Assets recovered in Value, and none shall be admitted to say the Assets went otherwise than the Recovery is; and in these Cases the Writ being Joint, and the Tenants vouching as Jointenants, the Recompence goes to such Joint Estate Tail the Tenants had, and not to the Estate Tail of the Feme or him in Remainder, 3 R. 6. and the Issue is never barred, but where Recovery in Value goes in lieu of the first Entail,

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Entail, which this Joint Estate cannot, and the Assets and Recompence causing the Bar, the Assets cannot vest in him in Remainder only, and so go to the Estate Tail, but must ensue the Loss by the Recovery, whereby it vests in Baron and Feme and Tenant for Life, and Remainder-Man jointly. *Dyer*

252. 3 *Cro.* 670. 10 *R.* 39. 645.

These are the Reasons given for these

¹ Leon. 86.

² Leon. 9.

Cases, which indeed favour of a wonderful Subtilty; and though no Man would venture to suffer a Recovery in this Manner, yet these seem to me to be *Apices Juris*, and perhaps if now agitated again, would not be so easily

admitted, since the Courts at Law now

use all Means to support Common Re-

coveries, as Assurances, now common-

ly used for Conveyance of Estates. *Ideo*

Quere.

See the Case
Page v. Hay-
ward, T.

³ *Anna, B.R.*
where these

Recoveries
seem to be

good. *Post. 175.*

If there be Tenant for Life, Re-
mainder in Tail, Remainder in Fee, if
he in Remainder in Tail suffers a Com-

mon

mon Recovery, it bars not the Entail, because no Tenant to the *Præcipe*; but if he in Remainder in Fee suffers a Recovery, that bars his Heirs, as has been said before. *Dyer* 252. 2 *Roll's Abr.* 395. *Moore* 356.

2 Inst. 342.

Lands are given to Husband and Wife, and the Heirs of the Body of the Husband, Remainder over, the Husband alone suffers a Recovery, wherein he is Tenant to the *Præcipe*, and vouches the Common Vouchee, this is no Bar to the Issue, or him in Remainder; for the Recompence cannot enure to the Estate, the Wife having a Joint Estate with her Husband, she cannot be a Partaker of the Recompence, because she was no Party to the Recovery; for the Estate between Husband and Wife is an entire Estate, and no Moiety between them; so the Husband alone no good Tenant to the *Præcipe*, and the Estate Tail and Remainder depended on the Estate of Husband and Wife, as on
an

an entire Estate. 5 R. 5. Owen 129, 130. Moore 210. Aliter of a Joint Estate conveyed to them before the Coverture; for there one Moiety is barr'd. Moore 95. Cooke Marquis of Winchester's Case. But if Husband be seized in the Right of his Wife for Life, Remainder in Tail to A. Remainder over to B. Husband by Bargain and Sale inroll'd, or by Lease and Release grants the Land to another, against whom a *Præcipe* is brought, who vouches A. and a Common Recovery is had; this bars all the Remainder and Entail, for here was a good Tenant to the *Præcipe*. 2 Roll's Abr. 394. So is Cupledick's Case. Husband and Wife seized for Life, Remainder to the Heirs Male of the Body of the Husband; Husband discontinues, and a *Præcipe* is brought against the Discontinuee, who vouches the Husband, who vouches the Common Vouchee, this is a good Recovery. 3 R. 6. a.

See Rep. temp. Talb. 167.

By the bargain & sale so much estate passes as the husband may lawfully grant, which is an estate during the coverture, & that such an estate is an estate for life determinable is expressly said in Co. Litt. 42. a. & the reason is, because it is for a term uncertain for as long as the husband lives, & as long as the wife lives, & as long as the husband is seized in right of his wife may vary & besides is a not

Though determinable till the death of either husband or wife, & is therefore an estate during their joint lives, which being a life estate of freehold, & in that of which the husband is seized in right of his wife may vary &

*well
Is derived out of it.*

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Though a Tenant to the *Præcipe* be absolutely necessary in every Common Recovery, yet if it be by Disseisin, it is good in many Cases. As if Tenant in Tail be disseised, and a *Præcipe* is brought against the Disseisor, and he vouches Tenant in Tail, who vouches over, this bars the Entail. So in *Lincoln College Case*, a Man makes a Feoffment, to the Intent the Feoffee should reconvey to him and his Wife, and the Heirs Male of his Body, which they do accordingly, and he has Issue a Son, and dies, the Son in his Mother's Life-time, *Tenens liberè Tenementi*, which must be intended by Disseisin, (being on pleading, and to be taken most strongly against the Pleader) suffers a Common Recovery, and Wife Releases with Warranty, and notwithstanding
 11 *H. 7. cap. 20.* held the Entail barr'd.
 3 *R. 58. 1 Inst. 326, 365. b. 1 Mod. 218. 2 Roll's Abr. 395.*

I

Upon

Upon what has been already said, it is apparent there must be a Tenant to the *Præcipe*, either by Right or Wrong, and therefore in many Cases it may seem wholly impracticable for those who have the Remainder in Tail to suffer a Recovery: The most usual Way is for him in Remainder to get the Tenant for Life to surrender to him conditionally; and in this, though the Tenant for Life keeps the Possession, yet the Recovery will be good. But if a Common Recovery be to be suffer'd of a Manor, wherein are many Leases for Lives of Part of the Manor, tho' the Practice has been to get Surrenders from the Lessees, that is only *abundans Cautela*; and I take it not to be necessary; and I think the Recovery good, though the particular Tenants for Lives did not surrender; for the Reversion of the Lands leased for Lives, remains still Part of the Manor; and the Fine or Deed that made the Tenant

In what cases, such a surrender will be presumed, see 2. Stra. 1129. & 1. Barr. Taylor & Atkins - see also 2. Barr. 1065. Goodtitle in demure of Bridges v. Duke of Chandos.

G to

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to the *Præcipe*, carried the entire Manor to him, as well Reversions as Possessions; for the Manor being an entire Thing, the Freehold thereof was in the Tenant to the *Præcipe*. To make this good, I shall endeavour to prove two Things.

First, That whatever is Part of the Manor, whether in Possession or Reversion, passed with the Manor.

Secondly, That the Reversions of the Tenants for Life are Part of the Manor, and pass'd by Grant of the Manor to the Tenant of the *Præcipe*, and consequently the Recovery of the Manor a good Recovery.

As to the first Point, if we look into the antient Year-Books, which are most nice and exact in all Real Actions, we cannot find one Instance of a *Præcipe* of a Manor, and another of Lands leased for Lives, that are Part of the Manor: But on the contrary, if a Man brought a *Præcipe* of a Manor, and in it

*See in 1. Powell's
Conveyance. Rec.
1796. a note, un-
derlining an
opinion, which
I take to be by
Mr. Justice Will.*

it demanded any Lands, Part of the Manor, he must either abridge his Plaint, or if the Tenant pleaded this Matter in Abatement, the Writ was abated *quia bis petitum*, it being superfluous to demand the same Thing twice; and if Lands are mentioned with a Manor, they shall be intended to be no Part of the Manor, because all that is Part of the Manor is comprehended in a *Præcipe* of the Manor; as 36 H. 6. 17. *Sci' fac'* to have Execution of the Manor of Dale, and six Acres of Land, it is no Plea to say the six Acres are Parcel of the Manor, because the contrary shall be intended.

48 Ed. 3. 11 Pl. 2. *Sci' fac'* on a Fine of the Manor of B. and demands forty Acres of Land, and twenty as Parcel of the Manor, the Tenant pleads *Nient Comprize*, and held no Plea, because every Part and Parcel of the Manor pass'd by the Grant of the Manor by the Fine, and therefore the proper Plea

+ f. 12 / it shall be intended, that it was not the intention to name them as parcel of the manor.

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was *Nient parcel*, which shews that if the Land be Parcel of the Manor, whether in Possession or Reversion, it passes by Grant of the Manor, which is an entire Thing, 34 H. 6. 1, 2. *Præcipe* of a Manor, Entry into a Part, ^{abates} abates the Writ, *aliter* of Acres severed.

2 Roll. Abr.
Tir. Grant,
58.

As to the second Point, it must be confessed that the Reversion of the Tenements in Lease was in the Owner of the Manor, otherwise he could not have the Rents and Services; so that it must be either a Reversion in Gross divided from the Manor, or else Part of the Manor. That it should be a Reversion in Gross, divided from the Manor, has no Colour or Reason; for when a Man is seized of a Manor and Demesnes in Possession, and makes a Lease for Life, and parts with the Possession of what he so leases in Lieu of the Possession, he has the Reversion and Services, which are annex'd to the Manor and Part of it, and the Reversion and Services naturally

turally follow the Right and Nature of the Land. As if a Bishop hath a Manor, and a Tenancy escheats, he has the Tenancy *Jure Ecclesie*; for the Tenancy came in Lieu of the Services, and the Services being Part of the Manor, the escheated Tenancy became Part of it, and is incorporated to it. And our Case is stronger; for if a Tenancy escheated, which has Time immemorial been held of the Manor, is incorporated to the Manor, and becomes Part of it when it falls, *a fortiori* the Reversion, which was never divided from the Manor, and was always Part of it, passes by Grant or Recovery of the Manor. And in our Case there was only a Temporary Interest granted for Life, and therefore the Reversion remains in the Grantor, as what he never parted with, and the Services attend the Reversion; and as the Possession was Part of the Manor, so are the Reversion and Services which follow the Manor

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nor as a Recompence for and in Lieu of the Possession granted to Tenant for Life. *Litt. sect.* 590. And this is not like the Case of the Grant of a Manor, excepting an Acre, for there the Acre is divided from the Manor. 6 R. 55, 56. But even in that Case, as to him that has a Right to demand the Manor, it remains Parcel, *Finch* 18. So if one lease a Manor for Life, except the Advowson, thereby the Advowson becomes Disapendant, because the Exception severs it from the Manor: But if one grant an Advowson Appendant for Life, the Reversion is still Part of the Manor, and passes with it, 5 R. 11. b. which shews the Difference between an Exception which severs the Thing excepted from the Manor, and a Lease for Life; for by the Lease nothing passed but what the Lessor intended, and what is not leased remains in the Lessor in another Degree, 38 H. 6. 38. a. If one lease an Acre Parcel of a Manor
 1 for

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for Life, and after grant the Manor, the Reversion passes, because the Acre was always Part of the Manor, and no more passes than what was granted, and that is only for Life; so what was not granted remains in the Grantor; and though the proper Term of Law for this is a Reversion, yet the natural plain Sense is no more, than that I am still seized of what is not granted, that is of the Land, Parcel of the Manor in another Degree than when in Possession. If I am seized of a Manor, and am disseized of an Acre Parcel of the Manor, it is not severed in Right, tho' it is severed in Possession; for by my Entry it becomes Parcel again. *M. 7. H. 7. 8 Pl. 10.* so an actual Severance is no Severance in Right, much more where there is no Severance at all. As to Authorities in Point, the Books are full of them, where it is unanimously held, that if a Man seized of a Manor leases Part of it for Life, the Reversion

version still remains Part of the Manor. *Litt. Sect.* 590. *1 Inst.* 324, 325. where a Diversity is taken that a Reversion of Part may be Parcel of a Manor in Possession, but a Part in Possession cannot be Parcel of a Reversion. *2 Leon.* 222. *Cro. El.* 522. *5 R.* 12. *11 R.* 50. *Cro. Ca.* 306, 308. *Winch* 46. *Litt. Sect.* 149, 227, 557, 591. *1 Inst.* 104, 151, 323. *a.* 324. *a. b.* And of this Opinion were Sir Edward Northey, Attorney General, Mr. Serjeant *Lutwich*, Mr. Serjeant *Broderick*, Mr. *Richard Webb*, and Mr. *Powley*, in a Case of great Concern left to be determined by Opinion of Counsel, between the Earl of *Pembroke* and the Lord *Windsor*, touching some Leases for Lives, which not being surrender'd, were supposed not to be barr'd by a Recovery suffer'd by the Earl of *Pembroke*, which being now question'd by the Lord *Windsor*, who married the only Daughter and Heir of the late Lord *Pembroke*, the Case being fully weighed

weighed and debated by Counsel of both Sides, it was agreed that the Reversion of those Tenements in Lease for Life pass'd, and the Entails therein were well dock'd, by the Recovery suffer'd by the Earl of *Pembroke*, in which Case Sir *Edward Northey* started a Difficulty that the Tenant to the *Præcipe* being made by Fine, the Reversion could not pass without Attornment; but as to that it is plain the Reversion pass'd by the Fine without Attornment, 1 *Inst.* 319, 320. and the Fine being to an Use, there needs no Attornment; so if it had been by Bargain and Sale inroll'd, or Lease and Release; for the Estate vests by Operation of the Statute of *Uses*, which is by Act in Law, so no Attornment necessary, 1 *Inst.* 309. *Moore* 32, 68. *Hob.* 165. 3 *Leon.* 101. 6 *R.* 68. 1 *Jones* 244. And the Objection was waived, and Lord *Windsor* had the Lands in Dispute; and the same Point hath since been agreed and deter-

H mined

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mined in the Earl of Derby's Family, *vide* the Appendix.

If the Land of which the Recovery is intended to be suffered, is not Part of a Manor, and is in Lease for Life, then it must be surrendered to him that has the Reversion or Remainder, before he makes a Tenant to the *Precipe*; or if the Surrender be after the Conveyance, that makes the Tenant to the *Precipe*, then to the Tenant to the *Precipe*; and by mistaking this, several Recoveries have been set aside: As for Example, If after the Lease and Release executed to make the Tenant to the *Precipe*, the Tenant surrenders to the Releasor, this is void, for he has no Reversion for the Surrender to operate upon.

Though, as has been before observ'd, where there is a Lease for Life, no Part of a Manor, that must be surrendered to make a good Tenant to the *Precipe*, yet no Term for Years hinders him that has the Freehold from suffering a Com-

mon Recovery, because the Law has little Regard to Terms for Years, which are only Chattels. And by the Statute of *Gloucester. cap. 11.* Lessee for Years in *London*, may falsify a Common Recovery, whereby the Judgment is not to be staid, but the Execution suspended during the Term, and this is done by a Writ *De Inquirendo super Statut' Glouc'*, and tried in the Hustings, and extends to other Towns that have such Courts; but the Statute extends not to any Case but where the Lease is by Deed, nor to Tenant by Statute *Elegit, &c.* But now the Stat. 21 *H. 8. cap. 15.* extends to all Leases out of *London*, and by that Statute the Lessee shall be receiv'd to falsify the Recovery before Judgment, and it shall suspend the Execution; but then he must not only aver the Collusion, but plead some Bar to the Plaintiff's Title; and this Statute extends to all those Cases where the Vouchee or Tenant lets Judgment go by Default.

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A Fine was levied in order to make a Tenant to the *Præcipe*, and a Writ of Entry brought against the Conufee, who vouches, and Recovery had, and doubted if this be a good Recovery; for the Fine having no Use declared, the Use results to the Conufor, and fo here is no good Tenant to the *Præcipe*. Tho' this Cafe has not received a formal Decifion, as I remember, and Sir *Edward Northey* and Mr. *Poley* were strongly of Opinion the Recovery was void, yet it feems, with Submiffion, the Recovery is good; for at Common Law a Fine was *Transactio Judicialis*, a final judicial Agreement on Record. And though a learned Judge has obferved it is not a Feoffment of Record, yet it has the Force and Effect of a Feoffment. Now at Common Law, if a Fine was levied without Confideration, as in a Fine, there needs none, the Conufee was Tenant to all Writs, till the Statutes of Pervers of Profits and

+ *Holt in Selk.*
339.-

and Uses ; and by the Statute of Uses, though the Use resulted back to the Conusor, where no Use was declared, yet the Intent of the Parties always guided the Use, and there could be no resulting Use against the Parties express Intention, so that whenever the Use results, it is because the Parties intended it, so not contrary to their Intent, which is the Guide of Uses, 1 R. 100. a. 6 R. 64. b. Now in this Case the plain Intent of the Parties here was to make a Tenant to the *Precipe*, and that is shewn on Record, by the Writ of Entry brought against the Conusee, and the Fine, Recovery and Deed, are all but one Assurance to cut off the Entail. 2 R. 72. b. 2 Lev. 54. Cro. Car. 321. *Hardress* 402. And the Reason of the contrary Opinion seems to be, that these Gentlemen took the Statute of Frauds to extend to Uses, which it does not, but only to Trusts ; for if a Man buys Land and pays for it, and has

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has no Conveyance, but a Fine without any Declaration of the Use of it, it is certainly good.

Since the foregoing Part, and indeed all this Book was wrote, the following Case has been resolved: A. Tenant in Tail, levied a Fine, and after suffered a Recovery, wherein the Conusee was Tenant, who vouched the said A. and there was no Deed to declare the Uses. It was objected, the Use of the Fine resulted to the Conusor, and though the Intent of the Fine was to make a Tenant to the *Præcipe*, yet no Use or Trust can be averr'd since the Statute of Frauds. But Lord Chief Justice Holt, and the Court of Queen's Bench, held the contrary; for at Common Law the Use was always intended to be to the Conusee, and was never averr'd in Pleading, unless it were to the Use of a Stranger; then it must be averr'd, and held, the Party was in by the Fine, and a good Tenant to the *Præcipe*, and that

that the Statute of Frauds extends not to Uses that arise by Operation of Law, but to such Uses as are to third Persons, which are Trusts, and since the Statute, neither Conusor nor Conusee can by Parol aver the Use to a third Person. 8 *Ann. B.R.* Lord *Anglesea* against Lord *Altham*. *Vide Latch.* 257. This Case is reported in 2 *Salk.* 676. but he has mistaken the Year, for it was not 8 *W.* 3. but 8 *Ann.* and also in a Book intitled *Reports of Cases in Equity*, f. 16. I find in several of the Law Books it is said, that in some Cases a Recovery may be good without a Tenant to the *Præcipe* by Estoppel; but this I take to be, where he who suffers the Recovery is Tenant in Fee; for Estoppels bind not the Issue in Tail, because he claims Paramount *per formam Domi*; and so is the Case of *Bull* and *Wyatt*, in *Cro.* 388. One *Riginald* and his Wife seiz'd in Fee, *Jure uxoris*, by Indenture let the Land *Habend' a die datus*, for

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for Life of the Lessee, rendring Rent, with a Letter of Attorney to deliver Seisin: The Attorney made Livery the same Day, *secundam formam Chartæ*: Lessee enters and pays the Rent: The Wife dies: The Heir before Entry suffers a Common Recovery, and the Court held the Lease void, and Livery the same Day it bears Date void, and urged that the Lessee entring, and paying the Rent, he is Tenant at Will, and not a Disseisor; but admitting it a Disseisin, and there was no Tenant to the *Præcipe*, yet held he and all claiming under him estopped.

To make a good Tenant to the *Præcipe*, in order to suffer a Common Recovery, it may be done either by Fine, Feoffment, Lease and Release, or Bargain and Sale enroll'd; and this latter Way by Bargain and Sale seems good before Enrollment, if the Deed be enrolled within six Months by relation; for in a stronger Case, if a Man bargain and sell

+ The ten^t to the
præcipe was made
by fine, which was
afterwards reversed;
yet the recovery,
being suffered before
the reversal, was
held good, because
there was a good tenant to the præcipe.

See 2. Burr. 1134.
edition

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sell Land by Deed, and before Enrolment bargain and sell again, and the first Deed is inrolled within six Months, the Bargain and Sale is good, which shews the Freehold was in the first Bargainee, otherwise could not transfer it. ^{the bargainee doth}
 2 Inst. 675. Noy 106. 2 Cro. 53, 409. Owen 150. Dyer 219. Moore 41. yet in Practice, I have known some very able Counsel refuse to let the Recovery be suffered till the Deed of Bargain and Sale, that makes the Tenant to the *Præcipe*, is inrolled, which is certainly the safest Way, though good, if inroll'd after. 2 Inst. 675.

If the Tenant to the *Præcipe* be made by Feoffment, Care must be taken that Livery be duly made before the Recovery; if it be by Lease and Release, it must be duly executed before the Recovery, and not helped by antedating it, though nothing is more common among Attorneys than to bring the the Deeds to *Westminster*, and often

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execute

X see 14. G. 2. c. 2. which provides for this case here put of fine & deed subseq. to the recovery, if completed in time

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execute them after the Recovery taken at Bar.

A Writ of Entry was returnable *Quinden' Martini*, 26 Nov. being a Monday, the Term ended the Wednesday following; the Lease and Release were dated the 26th and 27th of Nov. and the Recovery taken on Wednesday the 28th at the Common Pleas Bar, and ill, for it appear'd on the Face of the Recovery, that there was no Tenant to the *Præcipe*, for the Writ of Entry was returned before the Release bore date; and though the Prothonotaries, and some able Men held it good, yet on good Advice, it was held Erroneous.

Upon Consideration of the Case above-mention'd, the Recovery is certainly void; for since a Recovery was suffer'd of that Term, on the 26th of Nov. viz. *Quinden' Martini*, it cannot be otherwise presum'd but that the Tenant on that Day appear'd to the Writ, and

and Judgment was then given, and the Release bearing Date the 27th of Nov. it plainly appears there was no Tenant to the *Præcipe*, because Judgment was given *Quinden' Martini*; and though the Recovery was taken at Bar the 28th, and so noted by the Serjeants, yet the Judges take no Notice of that, and of nothing but what appears on the Record.

Note, By the Circuitiers it is said, that all Deeds to make a Tenant to the *Præcipe*, ought to be dated before the Term, because the Term is one Day in Law, and all that is done in the Term relates to the first Day, and a Deed after cannot be given in Evidence; but that may be easily cur'd, by taking an Exemplification of the Writ of Entry.

If Tenant for Years be made Tenant to the *Præcipe*, it does not extinguish his Term. 1 *Mod.* 107.

If a Recovery be of long standing, the Judges, who do all they can to sup-

port them, will presume there was a good Tenant to the *Præcipe*; and if such a Recovery be given in Evidence, will intend there was a good Tenant to the *Præcipe* at the Time of the Recovery, so will presume a Surrender of Tenant for Life. *2 Cro. 455. 2 Lut.*

It has been adjudged, that such a surrender cannot be presumed, where the deed making the tenant to the præcipe appears, & the tenant for life is not a party to it. See 2. Str. 1267. - 1129. - 2. Barr. 1072, 3, 4. 2. Inst. 1549.

CAPUT III.

Who may suffer a Common Recovery.

ALL Persons may suffer Common Recoveries, but those disabled by Law, and this Disability ariseth either from the Common or Statute Law. By Common Law Infants are disabled to suffer Common Recoveries, and to open this Matter, it will be necessary to see

see what Privilege the Law allows Infants in Adversary Writs.

It is natural that those, who, by Reason of the Infirmary of their Age, have not the full Use of Reason, and want Experience in the Management of their Affairs, should be under a legal Disability of prejudicing themselves; but as Nature has not fix'd an Age or Time certain when young People come to the Firmness of Reason, some attaining it sooner than others, therefore for the publick Tranquility, the Common Law adjudges all Persons Infants till they are Twenty-one Years old, because till then they are supposed not to have a Firmness of Judgment or Discernment capable to manage their Affairs.

The Learning when and in what Cases an Infant shall have his Age, and when not, is of great Extent, and not intended to be handled here, but only to shew some few Rules for the better understanding the Matters in
hand;

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hand; and therefore the Common Law allows Age to an Infant in by Descent, but not by Purchase; the Reason is, when he comes to the Land by Descent, he is in by Act of Law; but a Purchase is his own Act: So an Occupant shall not have Age. *Hob. 239. 1 And. 21. 6 Co. Rep. 4.* It is doubted whether an Infant shall have his Age in a *Cessavit*. My Lord Coke, *2 Inst. 401. 8 R. 44.* seems to be of Opinion that he shall have his Age, but *T. 25 Edw. 3. 9.* is against it; but it seems my Lord Coke's Opinion is Law, for this is a Statute highly Penal, and therefore by Equity extends not to Infants; for as in a *Cessavit*, the Defendant, by tendering the Arrears, and giving Security, may free himself; so the Law would be unreasonable to oblige an Infant to a Tender, when by Intendment of Law he has not Reason to know what to tender.

In Attaint, Disceit or Error, the Parol demurs, not for Non-age, but in Error,

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Error, to reverse a Fine, the Tenant being an Infant, and in by Descent, had his Age. *† 2. if the person is not, because an infant can only reverse a fine during his infancy*
Jenk. Cent. 97. 2 Cro. 39. 2 M. 19 H. 6. 25. Moore 847. 1 Rol. Abr. 251. 1 Rol. Rep. 251.

In Dower Age is not grantable, nor in Formedon in Remainder, but in Formedon in Descender it is, 6 R. 3. Thus to several Ends and to several Purposes the Common Law privileges Infants from Suits during their Infancy, and in other Cases not, all grounded on solid Reason; but in all Suits against an Infant, if he appears by Attorney it is Error, for two Reasons; first, because he is presumed not to have Discretion to make one, and the Law will not put it in his Power to hurt himself. Secondly, if he be deceiv'd, he has Nobody against whom he has Remedy; and for these Reasons, if in a Common Recovery an Infant is Tenant or Vouchee, and appears and pleads, or vouches either in Person or by Attorney, it is erroneous.

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roneous. *Stiles* 246. 2 *Roll's Abr.* 396.
Cro. Eliz. 158, 172. 1 *Jones* 318.

It was long dubious whether a Common Recovery suffer'd by an Infant, by Guardian was good; and in *Mary Portington's Case*, *Co. 10 Rep.* 43. the better Opinion seems to be that such Recoveries are erroneous; but that Point is now settled, and it has been the common Practice to do it by Privy Seal on weighty Reasons, which has some Resemblance with the Civil Law, where the imperial Authority supplies the Defect of legal Age. Upon producing this Privy Seal to the Court of Common Pleas, they admit a Person of known Ability and Integrity to be Guardian, and on shewing the Reasons for suffering a Common Recovery, and proving that it is for the Infant's Advantage, it is done in open Court. And in this Case the Judges have used to examine very strictly into the present Entails, (and take the Consent of those

See W. Jo. 31. the case of Godfrey & Wade, in which one question was wth common recovery by infant by guardian was good. See also W. Jo. 318. & my note here.

See Hob. 196.

those in Remainder) and into the Ends and Purposes of such Recovery, and to be attended with the Writings and Parties in Court or at their Chambers, before they admit a Guardian, and suffer the Recovery to be passed in Court. But then if the Recovery be to be with double Voucher, the Question will be, by what Conveyance the Tenant to the *Præcipe* must be made, since all Deeds made by an Infant, except a Feoffment, are void, and therefore it must be done by Fine or Feoffment; and this Admittance by Guardian, and the Reason of it, is grounded on *M. 9 Edw. 4. Pl. 10.* Writ of Right against an Infant who appeared by Guardians, and vouches and loses, and Judgment given against him, and there said, if a Guardian misbehave himself, the Infant has an Action against him, and the Court will admit of no Guardian, but such a one as is sufficient and able to answer the

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Infant

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Infant any Loss or Damage occasioned
by him.

But now there are frequent Parliaments where Bills are often passed to enable Infants to make Settlements; this Method of Infants suffering Recoveries by Privy Seal is seldom practised.

The next legal Disability is Cover-
ture, but the Law does not favour Co-
verture so much as Infancy ; and
therefore a Recovery by Husband and
Wife is good, ~~aniently~~ ^{as it is} as appears by
Mary Portington's Case : On all Reco-
veries ^{there} was a Writ to examine
Feme ^A Coverts ; and the first Mention
of such Examination is 43 Ed. 3. 18.
but now it is wholly disuted in Com-
mon Recoveries, though it still remains
in Fines.

Sept. 197. A Common Recovery suffer'd by
Husband and Wife bars the Wife of her
Dower, though she has no Recompence.
2 R. 74, 78. *Plowd.* 514. I have
heard some learned Men Question this,
because

because the Woman has then no Estate in *Esse* ; but with Submission, the same may be said against a Fine, and the Common Recovery estops her as Party, and the Recovery disaffirms her Husband's Title to the Lands of which she was dowable.

If Lands are given to Husband and Wife, and the Heirs of the Body of the Husband, Remainder to a Stranger, and the Husband discontinues by Fine or Feoffment, or grants the Land by Lease and Release, or Deed of Bargain and Sale inroll'd, and a Writ of Entry is brought against Conusee, Feoffee, or Grantee, and he vouches the Husband alone, who vouches the Common Vouchee ; this Common Recovery is good, and bars the Estate Tail and all Remainders, but not the Wife's Estate. But if Lands are given to Husband and Wife, and the Heirs of their two Bodies, Remainder over to a Stranger, and the Husband alone discontinues, and a

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Recovery is suffer'd, this is no Bar to the Entail or Remainders; so if Lands are given to Husband and Wife, and the Heirs of the Body of the Husband, and the Writ of Entry is brought against the Husband alone, and he vouches the Common Vouchee, this is no Bar to the Entail or Remainders; and the Reason is in the first Case, there is a good Tenant to the *Præcipe*, and Husband comes in as Vouchee of all Estates he ever had. But in the second Case the Estate Tail and Remainders are not barred, because the Wife having a Joint Estate of Inheritance with her Husband, the Recompence must follow the Estate, and a Recompence which goes to a Sole Estate cannot extend to a Joint Estate, as has been observed before. And in the third Case the Wife has a Joint Estate for her Life, and the Husband seiz'd jointly with her, and there being no Moieties between Husband and Wife, and each having the

the entire Estate, the Remainder depends on the particular Estate they both jointly have, without Division; and when the Husband alone takes the Tenancy on himself, though it is good by Estoppel, yet not according to the Interest he has in the Land, and when he is vouched and enters into Warranty, he shall be intended Donor of that particular Estate which the Tenant had when he vouched, and of no other Estate; and this is a sole Estate only by Estoppel, and not a Joint Estate by Entireties with his Wife; and as the Vouchee comes in, so the Recompence goes, which is only to the sole Estate of the Husband, and not to the Remainder, for that does not depend on a Sole, but Joint Estate; so that by Reason of the Recompence the Remainder is not barr'd, it is at large, notwithstanding the Estoppel, which goes not in Privy to him in Remainder, being a Stranger to the Tenant; and
there

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there is no Occasion to faifly, ecaufeb
the Title is falfe. 5 Co. Rep. 5. 3 R. 6.
9 R. 140. 2 Rol. Abr. 395. Stiles 320.
4 Leon. 26. 1 And. 44. 162. Goulds. 26.
Dal. 37.

If Lands are given to Husband and
Wife, and the Heirs of their two Bodies
begotten, and a Writ of Entry is brought
againft the Tenant of the *Præcipe* made
by them, and they come as Vouchees,
and vouch the Common Vouchee, this is
a good Common Recovery. So where
Lands are given to Baron and Feme,
and the Heirs of the Body of the Wife,
or to the Wife, and the Heirs of her
Body, and a Writ of Entry is brought
againft both, and they vouch the Com-
mon Vouchee; fo if a Man has Land
wherein his Wife has a Jointure or
Dower, a Recovery bars her. *Plowd.*
514.

Husband makes a Feoffment to the
Ufe of himfelf for Life, Remainder to
his Wife in Tail, Remainder to both
their

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their Heirs, and a *Præcipe* against him and his Wife, and they vouch Common Vouchee, this Common Recovery bars not the Entail, because he was not seised of the Estate Tail. *M. 12 E. 4. Pl. 16. Dyer 25, 26. Owen 129.* If Husband and Wife be Tenants in Special Tail before Marriage, Remainder to Baron in Tail Male, Remainder to *J. S.* in Fee, Baron alone makes a Deed of Bargain and Sale to make a Tenant to the *Præcipe*, who vouches the Husband, and he the Common Vouchee, and doubted if it barr'd for a Moiety, the Estate being made before the Coverture, so that there were Moieties between them; but in this Case Husband and Wife died without Issue Male, whereby the Special Tail limited to them was determined, and the Husband having a Remainder to his own Heirs Male, this Remainder was barr'd, and the Remainder to *J. S.* 3 *Lev. 108.* from all which Cases it may be observed, that the Husband,

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band, whether seised jointly with his Wife, whether by Moieties or Entireties, or seised only in Right of his Wife, may create an Estate of Freehold during the Coverture, and thereby make a good Tenant to the *Præcipe*, without his Wife's joining; and this now is in constant Experience and Practice, and saves the Charge of a Fine.

As to Ideots and Madmen, the Law has so high a Regard to Matters of Record, that a Fine levied, or a Recovery suffer'd by them is unavoidable; and to prove this, there is a notable Case, *Hugh Lewis*, in Consideration of 60 *l.* entfeoffs *J. Williams* of the Manor of *D.* and *J. Williams* is bound to *Hugh Lewis* in a Bond of 100 *l.* for Payment of 50 *l.* *J. Williams* deviseth the Manor to *William Wynne* and his Heirs, and dies, *William Wynne* pays the 50 *l.* to *Hugh Lewis*, who levies a Fine of the said Manor to *William Wynne*, and by Office found *Hugh Lewis* was an
 I
 Ideot,

Ideot, *a Nativitate*, and held the Fine good, for both *Hugh* and his Heirs are estopped to say he was an Ideot; and the Court would rather Judge the Office void, than bring this judicial Act in Question, or the Judgment of the Court that accepted the Fine. 2 And. 163.

Attainder is a legal Disability; and therefore if Tenant in Tail be attaint, and an Office found, the Land granted to *A.* who sells it to *B.* who suffers a Common Recovery, and therein vouches Tenant in Tail, the Remainders are not barr'd. *Godb.* 218. But *Allen* in 1 *Keb.* 30. *contra Arguendo*, 1 *Keb.* 398. But notwithstanding the Opinion in *Godb.* yet it seems there is such a *Scintilla Furis* in the Tenant in Tail, after an Attainder, that by a Common Recovery, if there be a good Tenant to the *Præcipe*, he may bar the Issue, Reversions and Remainders; for if the King pardon the Party, and restore the

L Land,

*See 2. Wils. 219.
Co. Litt. 2. 6.*

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Land, though the Attainder is in Force, he may bar the Entail.

Alien is also another legal Disability, and if an Alien be Tenant in Tail, this is a good Estate Tail, but not descensible to his Issue, 9 R. 141. But if Lands are given to an Alien in Tail, Remainder to C. in Fee, the Alien suffers a Common Recovery, and after an Office is found, this Recovery bars C. and the King has a good Fee; for till Office he was seised, and there was a good Tenant to the *Præcipe*. Godb. 102. Noys 137.

Besides these natural and legal Disabilities before-mentioned, Conveniency, Decency and Order hinder some from suffering Recoveries, and therefore the King cannot suffer a Common Recovery, for if he suffer a Common Recovery, he must be Tenant or Vouches; and in both Cases the Demandant must count against him, and there must be Judgment against him, which the Law
does

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does not suffer, so cannot come in as Tenant by Receipt; but if the Party have any Warranty, he must pray him in Aid. 1 Cro. 96, 97.

Other Persons disabled are those that for some particular Reasons are so by Act of Parliament, occasioned by the Abuse of Common Recoveries: And first by the 11 H. 7. cap. 20. whereby it is enacted, That if any Woman which had or hereafter should have any Estate in Dower for Life, or in Tail jointly with her Husband, or only to herself, or to her Use, of any Manors, &c. of the Purchase or Inheritance of her Husband, or given to the Husband and Wife in Tail, or for Life, by any the Ancestors of the Husband, or any other Person or Persons seised to the Use of the said Husband, or of his Ancestors, and have or shall hereafter, being Sole, or with any after taken, Husband suffer a Recovery, &c. then the Recovery to be void, and that then

Persons disabled by Statute.

11 H. 7. c. 20.

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it shall be lawful to the Person or Persons, &c. to whom the said Manors, &c. belong, after the decease of the said Woman, to enter, &c. provided this Act extend not to any Recoveries had with the Heir next inheritable to the Woman, nor where he or they that next after the Death of the said Woman should have the Estate of Inheritance in the said Manors, &c. be assenting or agreeing to the said Recoveries, where such Assent is of Record, or enroll'd.

This Act was made to Remedy a very great Abuse crept in by the frequent Use of these Common Recoveries; for being now become one of the Common Assurances of the Realm, and the common Method used to bar Entails, Jointresses who had been advanced by their Husbands, and had Estates Tail limited to them by their Husbands, or their Ancestors, and which Estates were designed for the Benefit of their Issue, frequently

frequently used these Common Recoveries, among other Discontinuances this Statute mentions, and thereby gave these Estates from their Issue and Husband's Family. To remedy this Abuse this Act was made; and to prevent, not only every Bar, but every Discontinuance, and to preserve the Entail for the Benefits of the Issue inheritable by Force of it; and therefore if *A.* makes a Feoffment in Fee to the Use of himself and his Wife, and the Heirs of their Bodies lawfully begotten, *A.* has Issue *B.* and dies, the Feme is disseised, *B.* releases to the Disseisor, and has Issue *C.* Feme releases to the Disseisor, with Warranty, Disseisor suffers a Recovery, and vouches Feme; *B.* dies, his Issue may enter. § R. 59.

If Tenant in Fee marries, and has Issue a Son, the Wife dies, Baron takes a second Wife, and settles his Estate on himself and his Wife, and the Heirs of their two Bodies lawfully to be begotten,

ten, and has Issue another Son, and dies, the Mother and her Son make a Tenant to the *Præcipe*, against whom a Writ of Entry is brought, and he vouches the Mother, and she her Son, and he the Common Vouchee; this a good Common Recovery, and bars the Estate Tail, and all Remainders and Reversions; for the Intent of the Act was not to save the Estate only for him that was Heir apparent, but for the Issue of that Entail; and the Proviso of the Act extends to him next inheritable, and that is in this Case, the Issue in Tail, 3 R. 59. 1 Jones 31. Hob. 332. *Mac Williams's Case*, which was this very Case, but turned on another Point; and wherever the Heir in Tail conveys or assures the Land to another, and the Wife releases or confirms with Warranty to perfect the Assurance, it is not within this Act. 3 R. 60.

If a Man makes a Feoffment in Fee to the Use of himself and his Wife

in Tail, Remainder to the Husband in Fee, and dies, and leaves a Daughter, his Wife enseint with a Son, the Reversion descends to the Daughter, though the Mother and Daughter join in a Recovery, yet this is void as to the after-born Son. 3 R. 61.

To bring the Feme within the Compass of this Act, the Provision must come purely from the Baron or some of his Ancestors; and therefore if one be seised of Lands in Fee, and has Issue two Daughters, and on the Marriage of one agrees, in Consideration of 150*l.* and the Marriage, to levy a Fine to the Husband and Daughter, and the Heirs of the Body of the Daughter, if the Husband dies, leaving Issue by her, she may by Common Recovery bar this Entail; for it is out of the Act, being a Provision made by her Father, and the Consideration of 150*l.* was not regarded. But if Husband and Wife in this Case sell the Land, and purchase

purchase other Land with the Money, and settle it as aforesaid, this is within the Statute, and she cannot by a Common Recovery bar the Issue, for the Money was the Husband's, and this a Purchase made by him within the Statute. *Palm.* 21, 32, 216, 217, 1 *Jon.* 13, 254. 2 *Cro.* 624. *Cro. Car.* 244. *Plowd.* 464. 1 *Inst.* 366.

A Man seised of Land in Fee, levied a Fine to the Use of himself for Life, and after to his Wife in Tail, General Remainder to a Stranger in Fee; this is within the Words of the Act, and out of the Intent of the Act; for limiting the Estate to her and the Heirs of her Body, with Remainder to a Stranger, shews he meant any Issue of her Body should inherit by any other Husband. *Cro. El.* 2.

A Man seised of Lands in Fee levied a Fine to the Use of himself for Life, and after to his Wife and the Heirs of her Body by him begotten, they both
 2 having

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having Issue, suffer a Recovery; and
 1 Inst. 365. b. said it is void; but I
 cannot see how this can be Law, for
 the Husband and Wife joining, may
 bar their Issue by a Recovery. 2 Cro. 475.

*This seems to have
 been taken for
 granted in the
 phant & Pri-
 vidge 1. lev.
 30. There is more*

A Man seized *Jure Uxoris*, they two
 levy a Fine, and Conusee grants and
 renders the Land to them in Special
 Tail, Remainder to the right Heirs of
 the Husband, they have Issue, and the
 Husband dies, she marries again and
 suffers a Common Recovery; this is
 within the Letter, but out of the Mean-
 ing of this Act, which extends not to
 any Case but where the Estate is by
 Gift or Conveyance of the Husband or
 his Ancestors; and here originally the
 Estate moved from the Wife.

If there be Great Grandfather,
 Grandfather, Father and Son, and the
 Great Grandfather seized *Jure Uxoris*
 before the Statute of Uses, settles the
 Estate to the Use of the Grandfather
 for Life, Remainder to his Wife for

M

Life,

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Life, Remainder to the Father and C. his intended Wife, and the Heirs of their two Bodies, Remainder to the Son in Tail; Great Grandfather dies, and then the Statute of Uses is made, his Wife enters, Father dies, and C. his Wife, with an after-taken Husband, suffers a Common Recovery, and held to be within the Meaning of this Act; for the Land was the Great Grandfather's, and the Settlement equivalent to an immediate Gift made to the Father and his Wife, and the Donors are the Baron's Ancestors. *Bendloe* 40.

If the Baron alone suffers a Recovery of the Wife's Lands, she may enter after his Death; for as the Stat. 11 H. 7. hinders the Discontinuance of the Wife, so 32 H. 8. c. 28. makes the Husband's not prejudicial to the Wife, who at Common Law was on a Discontinuance put to her *Cui in Vita*, but by this Statute may enter. 2 *Inst.* 681.

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The next Stat. that disables particular Persons from suffering Common Recoveries, is 33 H. 8. *cap.* 31. whereby a Common Recovery suffered by Tenant for Life, without the Consent of him in Remainder or Reversion, was made void. This Statute is at large in *Rastal*, printed in 1618. By this Act all Recoveries against Tenant for Life or by the Curtesy, &c. are void; but if after this Act Tenant for Life had made a Lease for Years, and the Lessee had made a Feoffment, and a *Præcipe* had been brought against the Feoffee, and he had vouched Tenant for Life, this was out of the Statute, because Tenant for Life was not then seised for Life, and had only a Right, and the Estates in Remainder and Reversion were turn'd to a Right; and at Common Law a Recovery against Tenant for Life with Voucher on a lawful Warranty, with a Recovery in Value, was a Bar to him in Remainder or Reversion, which this

Stat. 32 H. 8.
cap. 31.

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Statute remedied; and the Reason was, because the particular Estate and Remainder were but one Estate and one Warranty extended to both, and so the Recompence in Value extended to both Estates. 10 R. 44, 45. But this Statute is repealed by the Stat. 14 Eliz. c. 8. which makes fuller Provision for avoiding Recoveries suffer'd by Tenant for Life, and such others.

*See Co. Litt. 362.
a. 10. Co. 43. b.
& post 92.*

*Note Recovery by ten.
for life a forfeiture as
much as fine or possession.
Revised 1. Co. 15. b.*

*Stat. 34 & 35
H. 8. cap. 20.*

The next Statute relating to Common Recoveries is 34 & 35 H. 8. c. 20. whereby it is enacted, that if the King give any of his own Manors, Lands, &c. or cause or procure another in Consideration of Money or other Lands, to give any Manors, &c. to any of his Subject or Servants in Tail, in Recompence of their Service, Remainder to the King in Fee-simple or Fee-tail, such Estates Tail are not to be barr'd; for thereby it is enacted, That no feigned Recovery hereafter to be had by Assent of Parties, against any Tenant or Tenants

nants in Tail, of any Lands, Tenements and Hereditaments, whereof the Reversion or Remainder at the Time of such Recovery had, shall be in the King, shall bind or conclude the Heirs in Tail; but that after the Death of every such Tenant in Tail, against whom such Recovery shall be had, the Heirs in Tail may enter, hold and enjoy the Lands, &c. recovered according to the Form of the Gift in Tail, the said Recovery notwithstanding.

It is *vexata Questio*, how far at Common Law a Remainder vested in the King was divested by Recovery and Discontinuance; and this very Act was made to prevent these Recoveries binding the Issue, but extends only where the Gift was by the King or his Procurement. Before the Statute of *Donis*, when the King created a conditional Fee, there was no Reversion, but a Possibility in the King; and if the Donee had Issue, and aliened, the King's Possibility was

*see Co. Litt. 35 A.
& Lord Stafford's
case D. W. 44.*

was barr'd, as well as that of a common Person ; but the Statute of *Donis* turned that Possibility into a Reversion, so that the Question is, if, at this Day, one make a Gift to *A.* in Tail, Remainder to *B.* in Tail, Remainder to the King in Fee ; if in this Case *A.* suffers a Common Recovery, this bars *A.* and his Issue, and the Remainder to *B.* but not the King's Reversion, for that cannot be discontinued or put to a right, or pluck'd out of him by the Act of a third Person ; and therefore the Difference seems to be, that by an Act in Law a Remainder or Reversion may be divested out of the King, but not by Act of the Party ; as if there be Tenant in Tail, Remainder to *A.* in Fee, Tenant in Tail discontinues in Fee, and takes back an Estate to himself for Life, Remainder to the King in Fee, Tenant in Tail dies, the Issue is remitted, and the Remainder pulled out of the King, and vests in *A.* but the Act
of

of the Party as a Fine or Common Recovery, shall never divest any Estate, Remainder or Reversion out the King; but if a Recovery be on good Title against Tenant in Tail, and the King has the Remainder by defeasible Title, there it shall divest the Remainder out of the King, and restore and remit the right Owners. *Plowd.* 483, 553. *Dyer* 344. 2 *R.* 53. 8 *R.* 76. 1 *Inst.* 354. 6 *Roll. Abr.* Tit. *Common Recovery.*

In the Resolution of that Case, the Court was of Opinion all was barr'd till it came to the Crown; and so is *Brooke*, Tit. *Affurance*, Pl. 6. and so is the common Opinion, that the Crown is not barr'd.

Moore 344.
Sir Hugh
Cholmeley's
Case.

If one make a Gift in Tail, and the Crown descend to him; or if the King's Ancestor, not being King, make a Gift in Tail, and the Reversion descends to him, the Estate Tail may be barr'd. 2 *R.* 15. If a Man makes a Gift in Tail,

*But in this there is a
very material
omission, namely,
that the grant
to the king of
the rem. was
so long as the
tenant for life,
to whom if the
male the rem.
in tail was
had if the male
of his body.*

Tail, Remainder in Fee, he in Remainder grants his Estate to another for Life, Remainder to the King in Fee, on Condition to be void on Payment of Money: A Recovery by Tenant in Tail bars the King's Remainder and Condition; for the Grant was void, 2 R. 52. Noy 132. Telv. 149. 1 Leon. 8. But if Tenant in Tail of the Gift of the King, makes a Gift in Tail, the second Donee is not within the Statute; for his Estate, as far as it could disaffirm the Reversion of the King, though it could not take it out of him, and his Possession, was injurious to the Estate given by the King. Jones 251.

If the King grant an Estate Tail, reserving the Reversion to himself, and after grants the Reversion to another; Tenant in Tail may suffer a Common Recovery, and thereby bar the Reversion.

If a Subject, by the King's Provision or Procurement, makes a Gift in Tail,

Tail, and then grants the Reversion to the King for Life or Years only; in this Case the Estate Tail, Remainders and Reversions may be all barr'd by a Common Recovery.

If there be Tenant in Tail, Remainder or Reversion in Fee to another, and he in Remainder or Reversion, by Deed of Bargain and Sale enroll'd, bargain and sell his Reversion to the King; or if one covenant to stand seised to divers Uses, Remainder to the King in Fee, if Tenant in Tail, in either of these Cases suffers a Common Recovery, this bars these Reversions.

In the Earl of *Chesterfield's* Case, it was held by all the Judges of *England*, that if the King make a Gift in Tail, saving the Reversion to himself, and afterwards give Leave to the Tenant in Tail to suffer a Common Recovery, and to that Intent the King grants the Reversion to others on Trust, after the Recovery had, to re-convey it to him,

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the Tenant in Tail suffers a Common Recovery, this bars the Entail and Reversion, and is not within this Statute, because the Reversion was once severed from the Crown, and the Privy of Estate gone; and the Statute must be intended to restrain Common Recoveries, where the Reversion is in the same Plight that it was at first, without any Alteration. *Hard. 409.*

In the great Case of the Earl of *Derby*, the Question, among others, was, If an Estate Tail created by King *Richard III.* which after by a private Act, of the Fourth of *James I.* was limited otherwise to the Heirs Male of that Family, Reversion in the Crown, was within this Statute? And the Judges were of Opinion, that notwithstanding this private Act of Parliament made some Alteration, (*viz.*) the Tenants in Tail to be Tenants for Life, with Remainders to their Sons in Tail Male, yet all these Limitations being within
 I the

the Compass of the first Entail, as the King was Donor, the Issue could not be barr'd by Fine or Common Recovery. *Raym.* 338.

If the King, in Consideration of Moneey, or other Consideration by Way of Provision, procure a Subject to settle his Lands on one of his Servants in Tail, for Recompence of Service, by Deed of Bargain and Sale enrolled, with Remainder to the King in Fee; and all this appears on Record, the Tenant in Tail cannot by a Common Recovery, bar his Issue; and the latter Words of this Act (had done or suffered by or against any such Tenant in Tail) must be intended where Tenant in Tail is Party or Privy to the Act, be it by doing or suffering that which should work the Bar, and not by mere Permission. As if Tenant in Tail of the Gift of the King, Reversion to the King Expectant is disseised, and Disseisor levy a Fine, and five Years pass, this bars the Estate Tail. And so if a collateral Warranty

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be made by the Ancestors of the Donee, and the Donee suffer the Warranty to descend without any Entry made in the Life of his Ancestor; this binds, because he is not Party or Privy to any Act either done or suffered by or against him. 1 *Inst.* 373. *Moore* 467. *Sid.* 166. *contra.* 3 *Cro.* 595. 1 *Cro.* 13. 11 *R.* 78. *Yelv.* 72, 73, 74. 8 *R.* 77. 1 *And.* 46. *Vide* in the Appendix a notable Case on this Stat. in the Earl of Derby's Family.

See ante 91

Stat. 14 Eliz.
cap. 8.

The next Statute relating to Common Recoveries is 14 *Eliz. c.* 8. whereby it is enacted, that all Recoveries had or prosecuted by Agreement of Parties, or by Covin, against Tenant by the Curtesy, Tenants in Tail, after Possibility of Issue extinct, for Term of Life or Lives, or Estates determinable on Life or Lives of any Lands, Tenements and Hereditaments, whereof such particular Tenants are so seised, or against any other, with Voucher over of such particular Tenants, or of any having Right or Title to any such

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parti-

particular Estates from henceforth (as against the Reversioners or them in Remainder, or against their Heirs and Successors) shall be clearly void; provided this Act shall not prejudice any Person that shall by good Title recover any Lands, &c. without Fraud, by Reason of any former Right or Title. Also every such Recovery had by the Consent or Agreement of the Person in Reversion or Remainder, appearing of Record in any of the King's Courts, shall be good against the Party so assenting.

Though the Stat. 32 H. 8. provided sufficiently against Common Recoveries suffered by Tenant by the Curtesy, Tenant *Après Possibility*, Tenant in Dower or for Life, yet several Inventions were set on Foot to evade that Act, all which were fully remedied by this Act, 14 El. and therefore if any of these Tenants now suffer Common Recoveries, either as immediate Tenants or as
Vouchees,

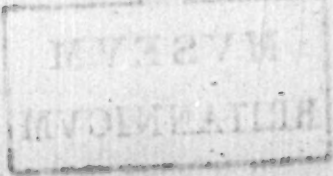
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Vouchees, without the Assent, and to the Prejudice of him in Reversion or Remainder, such Recoveries are void, and bar not the Reversion or Remainder, and are Forfeitures; so that if Tenant for Life be made Tenant to the *Præcipe*, or comes in as Tenant in Law by Voucher, the Recovery is void; but if he in Remainder agrees, then it is good. So if there be Tenant for Life, Remainder in Tail to *A.* Remainder to *B.* with divers Remainders over, and a *Præcipe* is brought against Tenant for Life, who vouches *A.* and he the Common Vouchee, this is a good Recovery, and bars all Entails, Reversions or Remainders. So if one seised of Lands in Fee, and has Issue two Sons, *A.* and *B.* by his first Wife, and a Daughter by his second Wife, and devise his Land to his Wife for Life, Remainder to *B.* in Tail, and dies; in this Case the Reversion descends to *A.* his eldest Son. If a Writ of Entry is brought against the

the Wife, and she vouches B. who vouches the Common Vouchee, this is a good Common Recovery, and bars the Remainders and Reversion, though the Heir in Reversion never assented. If a Writ of Entry is brought against Tenant for Life, and he makes Default after Default, and then the next in Remainder is received, or if he prays in Aid of them next in Remainder or Reversion, and they vouch over, this is a good Recovery. And though the Stat. 11 H. 7. 32 H. 8. 35 H. 8. say the Recovery shall be void, that is, only to the Heir, Issue or Remainder-Man, as the Case happens, but it is good among the Parties.

As to Ecclesiastical and Spiritual Persons, as Archbishops, Bishops, Dean and Chapters, Prebendaries, Parsons, &c. a Common Recovery by them is prohibited, as well as other Alienations, by several Acts of Parliament.

CAPUT



CAPUT IV.

Of what Things a Common Recovery may be suffered.

A Common Recovery being a Common Assurance, may be suffer'd of all Things that a Writ of Covenant for levying of a Fine lies; only it lies not *De Fossato Stagno Piscar' Carocat' terra Estoveriis Homagio Fidelitate Servitiis faciend' de bovata terra Marist' selione terra Gardin' Cotag' Crofto virgat' terra Fodina Minera Mercat'*; though Use has alter'd this in several Points: But a Common Recovery may be of an Honour, Island, Barony, Castle, Messuage, Curtilage, Dove-house, Land, Meadow, Pasture, Underwood, Chapel, River, County, Warren, Rectory, View of Frankpledge, Waife, Estray, Felons Goods, Deodands,

FH

MVSEVM
BRITANNICVM

Deodands, Furze, Heath, Moor, Tithe,
&c.

It may be also of an Advowson,
 4 R. 74. *so de annua Pensione five*
reditu, because Common Recoveries are
 Common Assurances, 5 R. 40. *Pop. 22.*
 2 Vent. 32. 2 Roll. Rep. 67. So it may
 be of a Rent *de Novo*; and therefore
 if one grants a Rent to B. in Tail, Re-
 mainder to C. in Tail, by a Common
 Recovery, the Remainder to C. may be
 barr'd. *Sid. 285. 2 Keb. 55.* But if
 one grants a Rent in Tail to B. B. suf-
 fers a Common Recovery to the Use of
 C. and his Heirs. B. dies without Issue,
 the Rent is determin'd, because by the
 Common Recovery the Rent cannot be
 enlarg'd, to the manifest Prejudice of the
 Tertenant, and the Recovery cannot
 give the Rent a longer Continuance
 than the Grantor gave it. 2 Lutw.
 1225.

This must be
 understood of
 an Advowson
 appendant to a
 Manor; but I
 do not see how
 it can be of an
 Advowson in
 Gross, since
 the Parson has
 the Freehold,
 and therefore
 it ought not
 to be by Writ
 of Entry in
le Poss. but by
 Writ of *Droit*
de Advowson;
 and has been
 and is so prac-
 tised, except by
 some few At-
 torneys who
 act without
 Knowledge or
 Advice.

By a Common Recovery a reputed
 Manor may pass, 1 Lev. 28. So Lands
 O within

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within a Liberty; as if S. and C. be two adjacent Towns, and Tenant in Tail of Lands in both Towns being within the Liberty of S. suffers a Common Recovery of Lands in both Towns, but the Record is only in the Town of S. and Liberties thereof, yet held good to pass the Lands in C. *Sir Robert Otway's Case, 2 Vent. 32.*

The Parish of *Ribton* and Vill of *Ribton*, but the Vill not co-extensive with the Parish, *J. S.* was seised of Lands in Tail in the Parish and out of the Vill, and by Indenture of Bargain and Sale enroll'd, covenants to levy a Fine and suffer a Common Recovery of Lands in the Parish of *Ribton*, which were levied and suffered, but the Fine and Recovery were only of Lands in *Ribton*; and argued that this would not extend to Lands in the Parish of *Ribton*, because Division of Parishes is only an Ecclesiastical Constitution, and that of Towns and Vill Civil; and where a
Place

Place is named in a Record, it is only intended of what is Civil; but held by the Court, that this being in the Case of a Common Recovery, which is a Common Assurance, shall have a favourable Construction, and the Deed, Fine and Recovery are all one Assurance, and held good, and that the Lands passed. *Hard. 225. Cro. Car. 206. 1 Mod. 206. Hutt. 106. Cro. Car. 270. 1 Jones 309.*

A Recovery may be of Lands in a Place known, though it be neither a Vill or Hamlet, as well as a Fine may be of Lands in a *Lieu Conus.* *2 Mod. 49.*

If a Man have a Moiety or third Part of Lands, and suffer a Common Recovery of the whole, the Moiety or third Part passes, and shall be to such Uses as are declared by the Common Recoveries. So if Lands are given to two, and the Heirs of their Bodies, Remainders in Tail, one suffers a Reco-

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very of the whole ; in that Case, as well the Tenant as Vouchee, may by pleading abate the Writ: But if the Writ is admitted good, the Moiety well passes to such Uses as are declared by the Deed that leads the Uses of the Common Recovery, and the Jointure is severed, 3 R. 3. So if one seised of a third Part of Land, bargains and sells a Moiety, and a Common Recovery is had of a Moiety, this is a good Recovery of an entire Third, and not of a Moiety of a third Part. *Cro. Car.* 110.

Copyhold Estates being by Law Tenancies at Will, *Secundum confid' Mannerii*, and being in their Institution only impleadable in the Lord's Court, Common Recoveries are not suffered of them in the Court of Common Pleas. It was long *Agitata Questio*, whether Copyholds were within the Statute of *Donis*, and might be entail'd. My Lord Coke, in *Heydon's Case*, 3 R. 8. is of
 1 Opinion,

Opinion, that Copyholds could not be entailed without a Custom, and that the Statutes co-operating with the Custom, they might ; this is, indeed, a little dark and unintelligible. But my Lord *Hale* was of Opinion, they were within the Statute of Entails, and might be entailed as well as other Lands, 3 *Lev.* 327. And indeed this seems rational ; for as a *Copyholder* of Inheritance had Power by Surrender to make any Estate ; so when Entails were legitimated, it seems no way contrary to Reason, that he might limit an Estate Tail. The Books indeed are very unsettled, and many learned and elaborate Arguments on both Sides, but the better Opinion seems to be, that they may be entailed without a Custom ; but yet though they may be entailed without a Custom, yet no Recovery can be had of them at Common Law, as well because in the Eye of the Law, they are only Tenancies at Will, as because the Copyholder

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holder cannot make any Tenant to the *Præcipe*, but by Surrender. The Way therefore to suffer a Recovery of a Copyhold entailed, is either by committing a Forfeiture, as in *Grantham* and *Copley's Case*, where one *William Savill*, being Tenant in Tail of a Copyhold, makes a voluntary Lease for twenty-one Years, without Licence of the Lord, in order to commit a Forfeiture. The Lease was presented at the next Court, and the Lands seised into the Lord's Hands, and *William Savill* appointed the Forfeiture to be to the Use of *Arthur Savill* and his Heirs, and a Custom found that these Forfeitures were used to bar Entails, and held good, 2 *Sand.* 422. And in the Case of *Pilkington* and *Stanhop*, the Custom was, Tenant in Tail should commit a Forfeiture, then the Lord to make three Proclamations, and seise the Copyhold, and then to grant it to the Copyholder and his Heirs. And another Custom to bar Estates

I

Tail

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Tail and Remainders, which was, if Tenant in Tail made a Surrender to the Purchaser and his Heirs, the Purchaser committed a Forfeiture, on which the Lord seised, and on the Proclamations made, the Estate Tail and Remainders were barr'd. *Sid.* 315. 1 *Keb.* 752. 2 *Keb.* 127. and where there is none of these Customs, the usual Way to bar an Entail is thus: Tenant in Tail of the Copyhold Estate surrenders to one to make him Tenant to the *Præcipe*, *id est*, to a Plaintiff, who is admitted, and then a Plaintiff in the Nature of a Writ of Entry in the Post is brought against him, who vouches the Tenant in Tail, and he the Common Vouchee, and so a Recovery had; then the Recoveror surrenders to the Use of Tenant in Tail and his Heirs, who is admitted accordingly, and thereby the Estate Tail and Remainders barr'd. *Coke Ent.* 206, 207. *Pl.* 10.

As to Recovery of Lands in Antient Demefne, the Common Recovery is good, and stands in Force till reversed by the Lord, by Writ of Disceit, 4 Leon. 123. as in the Case of a Fine levied of Antient Demefne Lands.

A Recovery may be had of a Trust Estate, as where *Cestuy que Trust* in Tail is in Possession with Remainders over, under the Trustees, who have the legal Estate, and suffers a Common Recovery; though in this Case there be no good Tenant to the *Præcipe*, yet this Recovery will bar both the Estate Tail and Remainder and Reversion; for a Trust being a Creature of Equity, any legal Conveyance or Assurance of *Cestuy que Trust* shall have the same Effect and Operation on the Trust as it should have had on the Estate in Law, in Case the Trustees had joined; for otherwise, Trustees by refusing to join, or not being capable to execute the Trust, might hinder the Tenant in Tail of that

*See Cruise on
Recon. 239.*

*See the c. of Robinson v. Ho-
mings in rep. tem. Talbot,
where it is said, that a cer-
tain trust in tail can-
not bar a legal remain-
der in fee.*

that Liberty to dispose of his Estate and bar the Entail, Remainders and Reversion thereon expectant, which the Law gives him as incident to his Estate, 2 *Chanc. Rep.* 63, 79. And so was the Case of *Eaton v. Collier*, solemnly argued at the Rolls, 17 Decem. 1701. which I heard and observed, and is now the constant Practice of Equity, which probably may be grounded on the Statute of R. 3. which made Recovery or Feoffment of *Cestuy que Use*, good against Feoffees.

A Man seised in Fee of Lands before the Statute of Uses, to the Use of J. in Tail, the *Cestuy que Use* entfeoffs C. and W. who entfeoffs others to the Use of J. during his Life, Remainder to his Son in Tail; the Son has Issue, and dies, and a Writ of Entry was brought against J. and a Recovery had: J. dies, the surviving Trustees enter, and held that the Recovery binds the
P Feoffees

Feoffees only during the Life of 7.

1 *And.* 44.

Common Recoveries being Common Assurances, have a benign and large Construction, and therefore every Thing as incident, appendant or appurtenant, passes by them as in other Common Conveyances, and the Acres in Common Recoveries are computed according to the Custom of the Country, and not strictly according to the Statute *De Terris mensurandis.* 6 R. 67.

If a Common Recovery be suffered of a Manor and 1500 Acres of Land, and the Manor comprehends 3000 Acres of Land, yet all the Land passes, for a Common Recovery is now a Common Assurance of Lands, and by *Præcipe* of a Manor, even in Adversary Writs, all the Manor and Lands pass as has been shewed before in the Chapter of Tenant to the *Præcipe*; but the Danger is, because there is a separate and distinct Fine; for a Manor in the
Aliena-

Alienation Office, People often, to save that Charge, leave out the Manor : Now where the Manor is left out there, no more is barr'd by the Recovery than the Number of Acres contained in it ; but even in this Case, the Judges will give as favourable a Construction as may be, since now a Common Recovery is no more than a Common Conveyance used to convey an Estate Tail, and not only a Manor, but a reputed Manor passes by a Recovery, tho' there be no Freeholders now : Yet if it was formerly a Manor, and still retains the Name of a Manor, it will, as such, pass in a Fine or Recovery, and whatever is Part of it will pass. 6 R. 66, 67. Cro. Car. 308. Vide Cro. Eliz. 52. contra 1 Lev. 28. 1 Keb. 592.

CAPUT V.

Of the Difference between Common Recoveries with single Voucher, and those with Double Voucher.

A Recovery may be had either without any Voucher, or with single, double or treble Voucher; if there be a Recovery had without any Voucher, the Issue in Tail is not barr'd, for the Recompence in Value being the Reason of barring the Issue, a Recovery by Default, Confession, or *Nient dedire*, binds not the Issue, for he has no Recompence, and is not estopped by his Father's Judgment; for he claims Paramount the Estoppel, *per formam Doni*; and therefore in this Case the Issue may falsify.

If

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If the Recovery be with single Voucher, this is good to bar the Estate the Tenant was in Possession of at the Time of the Recovery, but no other Estate; if with double Voucher, and the Tenant in Tail comes in as Vouchee, then it bars all the Estates he has in Possession, and all others, though discontinued and turned to a Right; so that a Common Recovery, with a double Voucher, is in all Cases most safe; and the true Reason of this Difference between a Common Recovery with single and double Voucher is, that in a Common Recovery with single Voucher brought against Tenant in Tail, who vouches over the common Vouchee, if the Party be in of another Estate, the Issue after Tenant in Tail's Death, may plead *Nient Tenant' tempore brevis nec unquam postea*, and so the Recovery void, for he is not estopped, for at the Time of the Writ, not being Tenant of the Estate

† If the recovery be with a single voucher, the tenant to the full value is bound for the recovery. If it be with a double voucher, the tenant to the full value is bound for the recovery. This was determined in the House of Lords on the 17th of Decr. 1767. in the case of Thos. Mordaunt v. Henry Mordaunt & Henry Mordaunt. See the report in an appeal from the Court of Chancery in Ireland. In that case the following question was put by Lord Chanc. Camden for the opinion of all the judges. If the tenant for life remain to trustees to purchase a single recovery. Whether it be a recovery with a single voucher or a recovery with a double voucher is supported by it. whether it would bar the same or not? To which Wilkes Ch. J. delivered the opinion of all the judges, that it would not; in which the Chancellor concurred, & the decree was reversed.

Estate Tail, he can have no Recovery over of that Estate, for he was not seised of it, and a Common Recovery does not prove the Tenant was seised of an Estate Tail, but supposes it, and at the Time of the Recovery, he being in of another Estate, the Issue has right to the first Entail, notwithstanding the Recovery; and if the Issue enters after the Death of Tenant in Tail, he is remitted; so if Tenant in Tail discontinue in Fee, and repurchases the Land, and grants a Rent and dies, the Issue shall hold it discharged; and though the Ancestor has Judgment to recover in Value against the Common Vouchee, that binds not the Issue, for he cannot recover in Value of the first Entail, for that was discontinued, and a new Estate taken, and the Donor cannot warrant, by Reason of the first Entail, because the Tenant is in of another Estate, and this Recovery in Value cannot go to the Estate Tail, because the Tenant was

in of another Estate, and whether the Tenant in Tail shall recover in Value against the Donor or his Heirs, or against an Estranger, by Reason of a Release with Warranty, is all one; for the Land recovered in Value against the Donor, (who, by Supposition in Law, is always supposed to be vouched by the Donee, who suffers the Common Recovery) or Releasor, must be an Estate Tail, as well in one Case as the other; but if he who recovers in Value was not in of the Estate Tail, then the Land recovered in Value cannot go in Lieu of the Estate Tail; for it is a Rule that an Estate Tail shall never be avoided by a Recovery in Value, if that which is recovered in Value comes not in Lieu of the Estate Tail, which it does not in this Case, and therefore it defeats not the Estate Tail, but that descends to the Issue; and by his Entry getting the Possession, that accoupled with the Right, remits him; and this

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this being no more than a Recovery on a false Title, amounts only to a Discontinuance.

If one gives Lands to *J.* in Tail, and after *J.* recovers in Value against the Donor, of this Land recovered in Value the Issue shall have a Formedon, so is not prejudiced, because the Land recovered in Value, is in Lieu of the Lands lost by the Recovery; and that very Land shall be said to be the Gift of the Donor, because it comes in the Place and in Recompence for that which was given and evicted by the Recovery. But if *J. S.* gives Lands in Tail to *B.* and after *B.* recovers against *C.* by a Release with Warranty, this Land recover'd shall not be said to be the Gift of *J. S.* but of *C.* So in the Case of a Recovery with single Voucher, where the Tenant is in of another Estate, the Land recovered in Value cannot be in Lieu of the Estate he was not seised of when he was Tenant to the *Præcipe*, so the Recovery

covery is no Bar to the Issue, who can never be barr'd but where there is a real or possible Recompence by Recovery in Value. And therefore, if there be a Woman Tenant for Life, Remainder to A. in Tail, Remainder over in Fee; Feme and A. intermarry, and she and her Husband levy a Fine *Sur Cognizance de Droit come ceo*, and the Lands are render'd to the Wife for Life, Remainder to the Husband in Fee, and after they suffer a Common Recovery, with single Voucher, this is no Bar to the Entail, for the Husband was not seised of the Entail at the Time of the Recovery, and the Fine was no Discontinuance, according to *Coke*, 1 R. 76. a. 6 R. 15. a. And by the Render a new Estate is given, so the Recompence extends to the new Estate, not to the old one. So if A. dies without Issue, Remainder-Man in Fee may enter. *Cro. El.* 828. *Moore Pl.* 870. So if Tenant in Tail discontinue, and take back an

Q

Estate

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Estate in Fee, and a *Præcipe* is brought against him, and he vouches the common Vouchee, this bars not the Estate Tail, but only the new taken Fee. But if Tenant in Tail discontinues, and a *Præcipe* is brought against the Discontinuee, who vouches Tenant in Tail, who vouches over, this bars effectually the Estate Tail; for he who comes in as Vouchee in Judgment of Law, comes in Privy of all Estates he ever had before, though the precedent Estate on which the Voucher depends, is divested, discontinued and turned to a Right; for in this Case, where he comes in as Vouchee, he comes not only in of the Estate he has in Possession, but of the discontinued Estate, and all other Estates, and the Recompence in Value, which he has or possibly may have, bars the Issue. 3 R. 60. Moore 634. Owen 130.

If a Writ of Entry be brought against Tenant in Tail, and he vouches
 2 the

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the Common Vouchee, and a Common Recovery is had, this is good, and bars the Estate Tail, if the Tenant be then in Possession of it. So if Lands be given to A. in Tail, Remainder to the right Heirs of B. then living, and a Writ of Entry is brought against A. and he vouches the Common Vouchee, this a good Recovery, and bars the Estate Tail and Remainder.

If Tenant in Tail be disseised, and suffers a Common Recovery, with single Voucher, or if Tenant in Tail make a Feoffment of the Land, and take back an Estate to himself in Fee or in Tail, and suffers a Recovery with single Voucher, the Entail is not barred, for the Reasons herein before alledged, but by a Recovery, with a double Voucher; in all these Cases it is barr'd: And therefore, if Tenant in Tail levies a Fine or makes any other Conveyance, and a *Præcipe* is brought against the Grantee, who vouches Te-

nant in Tail, and he vouches over, this bars the Estate Tail. So if the Conufee or Grantee makes a new Estate to the Tenant in Tail, or he disseises the Conufee or Grantee, and then grants to another, and a *Præcipe* is brought against the Grantee, and he vouches the Tenant in Tail, and he vouches the Common Vouchee, by this all the Estates are barr'd.

If Lands are given to J. S. and his Heirs Male of the Body of his Wife, and he have Issue a Son, and his Wife dies, he discontinues and takes back an Estate to him and his Heirs Female of his second Wife; and after discontinues again, and takes back an Estate Tail to him and the Heirs of his Body; and after discontinues again, and a Writ of Entry is brought against the last Discontinuee, and he vouches Tenant in Tail, and he vouches the Common Vouchee, this Common Recovery bars all the Estates Tail.

If before the Statute of Uses, A. had been Tenant in Tail, and had made a Feoffment in Fee to B. and B. had made a Feoffment to C. to the Use of A. and his Wife, and the Heirs of their two Bodies, and the Wife had died, and A. had enter'd on C. the Feoffee, and made a Feoffment in Fee, and a *Præcipe* had been brought against the Feoffee, who vouches A. and he the Common Vouchee, this bars all the Estates.

CAPUT VI.

What is barred by a Common Recovery.

A Common Recovery duly suffered by Tenant in Tail, bars not only the Issue; but all Remainders and Reversions, which would take Place after the

the Determination of the Estate Tail, whether the same be in *Esse* or Contingent; and all former Estates, Leases and Charges made by him in Remainder or Reversion. And the Reason why Remainders and the Charges made by them that have them are barr'd, is collected from *Capell's Case*; for at Common Law the Remainder was only a Possibility of Reverter till the Statute of *Donis*; and on that Statute the Judges, by Construction, turned this Possibility into a fix'd Estate, called a Remainder or Reversion. Now as a Recovery was a Conveyance excepted out of that Statute, and an inherent Privilege annex'd to the Estate, as by it the Tenant in Tail could have barr'd the Remainder; so he may all Charges made by the Remainder-Man. And as the Grantor of that Charge had been bound by a Common Recovery, so had those that claim under him; for the Recoveror in a Common Recovery is in
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of an Estate he has gain'd under Tenant in Tail in Possession, which Estate is no Ways subject to the Charge of him in Remainder or Reversion, and the Charge of him in Remainder can be only good in Respect of the Possibility that the Land may come in Possession, which Possibility being destroy'd by the Common Recovery, the Remainder is gone, 1 R. 61. *Capell's Case*, 4 Leon. 150. *Poph. 5. Moore 154.* But the more solid Reason seems to be, that by the Recovery the Estate Tail is extended, and the Recoveror in of an Estate, that by Supposition of Law, continues forever; so that the Estate having a perpetual Continuance, no Charge of him in Reversion can ever take Place. See this explained by Lord Chief Justice *Hale*, in *Benson and Hodson's Case*, 2 Lev. 28. and the Case on Lord *Derewenwater's* Recovery was accordingly determined, under the Act 4 Geo. 1. by the Judge delegated to hear Claims on the

The case on Lord Derewenwater's Recovery is in 1. Stra. 267.

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the forfeited Estates, in which Case it was resolved, that he took no new Estate by the Recovery, by Way of Purchase, but was in of his old Estate, which by the Operation of the Recovery, was extended into a Fee-simple, and discharged of the Statute *De Donis, Westm. 2.* and the Limitations and Restraints introduced by that Statute; which Reason suits with common Experience; for if Tenant in Tail make a Lease not warranted by the Statute, or enter into a Judgment or Recognizance, and then suffer a Common Recovery, the Lease and other Incumbrances, are all good, which were before defeasible by the Issue; for the Recoveror comes in subject to all the Incumbrances of Tenant in Tail, and the Recovery opens, as we call it, and lets in all the Incumbrances; and therefore, when a Man has to do with Tenant in Tail that is incumber'd with Judgments, &c. it is very dangerous, though he suffer

See p. 155.

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suffer a Common Recovery; for all the precedent Judgments take Place of the Security he gives.

*See Mr. Butler's
note on Co. Litt.
fol. 203. b. note
1.*

Tenant in Tail incumber'd with Statutes and Judgments, makes a Mortgage of Part of his Estate for 500 Years, and after, to corroborate this Term, levies a Fine *Sur concessit* for 500 Years, with Proclamations to the Mortgagee; and the Question was, Whether this Fine should enture to the particular Advantage of the Mortgagee, or let in prior Incumbrances. Sir Edward Northey was of Opinion, the Fine let in all prior Incumbrances. Serjeant Lutwych, after great Consideration, was of a contrary Opinion; but it seems Sir Edward Northey's Opinion is the better; for let us take the Case without the Fine, and then see what Operation the Fine has. It is plain, that during the Life of Tenant in Tail, any prior Incumbrance was preferable to the Mortgage for 500 Years, and the

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Mortgagee could never avoid the prior Incumbrance; then what does the Fine do? That bars the Issue and gives the Conufee a Title as long as Tenant in Tail has Issue of his Body, though the Estate, which before was good only for Tenant in Tail's Life, and avoidable by his Issue, now bars the Issue, and is enlarged and made more extensive. And what Reason can there be that the Estate thus enlarged, should not have Continuance for other Incumbrances, as well as the Mortgage? I really can see none: Suppose this had been a Fine *Sur Conufance de Droit come ceo*, with Proclamations of the whole Estate, none will fay but this lets in the Incumbrances, as long as Tenant in Tail had Issue of his Body, and they should be preferred according to their Priority, what Difference is there then, between a Fine *Sur Conufance de Droit come ceo*, and a Fine *Sur Conceffit*, with Proclamations? Truly none, as to the barring the

the Issue, only one is a Bar during the Term granted, (by the Fine *Sur concessit*) and the other is a Bar as long as there is Issue; so that it seems the Incumbrances will take Place before the Mortgage; but the Case being never resolv'd, as I know of, deserves Consideration: But if in this Case Tenant in Tail had suffered a Recovery of Part, and declared the Use to the Mortgagee for 500 Years, no Doubt, all prior Judgments had been let in.

A Common Recovery does not only bar the Issue, Remainders, Reversions, and all Charges made by Remainder-Men, but estops all Parties; and therefore, if Tenant in Dower, or a Jointress, join in a Common Recovery, they are barr'd; and if there be no Tenant to the *Præcipe*, yet if the Party who suffers the Common Recovery have a Fee-simple, he and his Heirs are estopped. So if a Man seised in Fee, be disseised, the Disseisee, during the Dis-

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seisin, suffers a Common Recovery, though this be void for want of a Tenant to the *Præcipe*, yet the Disseisee, and all claiming under him, are estopped, *Cro. Car.* 388. So if there be Tenant for Life, Remainder to Baron and Feme, and their Heirs, and they suffer a Common Recovery, or come in as Vouches, this binds them and their Heirs, *Stiles* 319. And generally all are bound by a Common Recovery that cannot falsify, *2 Cro.* 592. And tho' a Common Recovery bars the Issue, and all Remainders and Reversions, and all Things dependant, incident or derived out of the Remainder, yet it bars not Things collateral to the Estate Tail. *2 Cro.* 592. *2 Roll's Rep.* 221.

Tenant for Life, Remainder in Tail, he in Remainder lets for Years, to begin after the Death of Tenant for Life, and after Tenant for Life suffers a Recovery, wherein Tenant in Tail is vouches, Tenant for Life dies, and the
Lease

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Lease held good, for the Lessee may falsify. *Cro. Eliz.* 718.

If Tenant in Tail grant a Rent in Fee, or make a Lease, and suffer a Recovery, and die, the Recoveror can avoid neither of them, for he is estopped to say Recoveree had not a Fee-simple. *Poph.* 5.

A Common Recovery bars also contingent Remainders; and therefore if a Man is seised in Fee, and devises to his eldest Son *Thomas*, for Life, and if he died without Issue living at the Time of his Death, to *Leonard*, another of his Sons, and his Heirs; but if *Thomas* had Issue living at his Death, then the Fee to remain to the right Heirs of *Thomas*. Devisor dies, *Thomas* enters and suffers a Common Recovery, and dies without Issue, and held *Leonard* barr'd; for *Thomas*, by the Will, had an Estate for Life, Remainder to his Heirs, not executed; and though the Reversion descended to him, as Heir, this

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this merges not the Estate for Life, contrary to the exprefs Will, but leaves an Opening for the Interposition of the Mesne Remainders, when they happen; so the Estate here to *Thomas*, being for Life, and the Estate to *Leonard* contingent, the Recovery bars it. *Sid.* 47. *Raym.* 28. 1 *Keb.* 29, 119. *Jones* 77. 1 *Lev.* 11. The Reason is because the Recovery destroys the particular Estate, which is the Prop of the contingent Remainder; and where-ever a contingent Remainder is limited to depend on an Estate of Freehold, which is capable to support a contingent Remainder, it is always construed to be a Remainder, and not an executory Devise. And where the Remainder is contingent, if the particular Estate, whereon it depends, be destroyed, the Remainder is gone; so a Devise to *A.* for Life, Remainder to his next Heir Male: *A.* suffers a Common Recovery, the Remainder is gone and destroyed, 1 *R.* 66.

Archer's

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Archer's Case, Cro. El. 453. So if it be to the right Heirs of a Stranger living, for the Estate is certain, though the Person is uncertain. *Sid. 47.*

Though a Common Recovery bars a contingent Remainder, yet it bars not an executory Devise, nor a springing Use. It must be owned, that People have been very ingenious in perplexing the Law; for these Terms are barbarous and unknown to the Common Law, and therefore it will be fit to see what an Executory Devise is.

An Executory Devise is where an Estate devised by a Testator, is future, and to arise on a Contingency; and is properly where such an Estate is made by Will, which cannot, by the strict Rules of the Common Law, take Effect; but the Party's Intention appearing plainly, the Judges, by Construction, make it good. There are two Sorts of Executory Devises, one where the whole Fee-simple passes; and that

is.

That is, a springing in the strict technical sense, of a contingent use after a fee.

is properly an Executory Devise: The other a Kind of future Devise, where the Fee does not pass, but in the Interim descends to the Heirs.

These Executory Devises are permitted *propter rei necessitatem*; and every Executory Devise of a Freehold, must be of a Fee, and on Condition; but when a particular Estate is limited, and the Inheritance passes out of the Grantor, then it is a Contingent Remainder; but if the Fee vests in any Person, and is to vest in another, on a Contingency, then it is an Executory Devise, which needs no Estate to support it, because the Estate descends to the Heir at Law, till the Contingency happens.

A Man devises to one and his Heirs, and if he dies without Heirs, then it shall remain over to B. this is a void Devise; for a Fee cannot mount on a Fee. But if a Man devises to A. and his Heirs, and if he die without Issue, living J. S. then to J. S. and his Heirs,
this

this is a good Executory Devise, not a Remainder, and a Recovery by A. does not bar it, 2 Cro. 591. So if Lands are given to B. and his Heirs, as long as C. has Heirs of his Body, and B. suffers a Common Recovery, this bars not the Donor of his Possibility, for he had not a Remainder or Reversion, but an Interest and Possibility, which cannot receive a Recompence in Value. So if Lands are devised to A. and his Heirs, as long as B. has Heirs of his Body, Remainder over, and A. suffers a Common Recovery, this does not bar the Remainder, for it is an Executory Devise, and it is not seen in Law till it appears, and has no Dependence on the first Estate. *Sid. 202. 1 Mod. 111.*

A Man by his Last Will devises to J. B. for ninety-nine Years, if he so long lives, Remainder to the first and other Sons of J. B. in Tail Male, Remainder to J. W. for ninety-nine Years, if he live so long, Remainder to his

first and other Sons in Tail Male, Remainder to the Heirs Male of the Body of *Elizabeth Long*, Remainder to his right Heirs. And Sir *Edward Northey* was of Opinion that the Remainder to the first Son of *J. B.* was an Executory Device, but it seems this cannot be construed an Executory Devise, because all Executory Devises are raised by Construction of Law, which makes the second Devise precede the first, to support the Testator's Intentions (as in *Manning's Case*). Now in this Case there can be no such Construction; And if the Remainder to the first Son of *J. B.* be construed an Executory Devise, then all the subsequent Remainders must be construed Executory Devises, or be void. If they are construed Executory Devises, that tends directly to a Perpetuity; if they are construed void, then the Will of the Testator is not performed; for he intended the subsequent Remainders li-

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mitted to the second and other Sons of
J. B. and the first and other Sons of
J. W. and the Heirs Male of *Elizabeth*
Long, should take as well as the first Son
of J. B. But this Intention being con-
trary to Law, the Remainder to the
first Son of J. B. and all the subsequent
Remainders are void. And of this
Opinion were the Judges, but the Judg-
ment was reversed in *Doma Procerum*,
and the Son of *Elizabeth Long*, though Trin. Term,
his Mother was living, had the Estate. 1713.

Beamont ver. Long, in a Writ of Error *see the case of Harris*
Cam' Scaccarii. *& Barnes determined*
in B. R. on a case

A. and his Wife seised of a Copy *sent out of chanc.*
hold Estate, *Jure Uxoris*, he and his *by Lord ch. Camden.*
Wife surrender to the Use of Husband
and Wife, and the Heirs of the Hus-
band; the Husband surrenders to the
Use of his Will, and after devises to
the Heirs of the Body of the Wife, if
he or they live to attain the Age of
Fourteen Years; and for want of such
Heirs, then to the Use of C. and his
S 2 Heirs,

Admission, except Mr. Pigott's question in the very passage. A. H.

B

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Heirs: Devisor died, the Wife married D. by whom she had Issue E. the Husband suffers a Common Recovery, this bars not, for this is an Executory Devise to the Heirs of the Body of the Wife. Raym. 162. It is said 2 Cro. 492. If he to whom Executory Devise is made come in a Vouchee, his Heir is barr'd, *See Quere.*

If the Remainder be in Abeyance, a Common Recovery bars, as Tenant in Tail, Remainder to the right Heirs of J. S. Tenant in Tail suffers a Common Recovery, this contingent Remainder is barr'd. 6 R. 42. Raym. 28. Sid. 47. 1 K. 29. 2 K. 47. 3 K. 389.

A Man (seised in Fee) by Lease and Release, seizes his Estate to the Use of himself for Life, Remainder to M. his Daughter, for ninety-nine Years, if she lives so long, Remainder to Trustees, and their Heirs, to preserve contingent Remainders; and after the Determination of the said Term, or the Death of

M.

The case here supposed & the doctrine upon it are important. But it is observable, that the author doth not refer to any authority. It runs therefore, that the doctrine of the case should be considered only as his own best opinion. What comes from so very able a writer on the subject of recoveries deserves to have great weight. But it strikes me, that it is at least questionable whether the doctrine of a recovery should be deemed to be inoperative, because at the time

X The remainder in tail of the vouchee was only a contingent remainder, and not a vested remainder, and therefore it was not barred by a recovery of a fee simple, as in the case of Brown v. Brown. The remainder was not barred by a recovery of a fee simple, as in the case of Brown v. Brown.

M. then to the Use of the Heirs of the Body of the said M. lawfully to be begotten; and for Default of such Issue, then to the Use of A. for ninety-nine Years, if she live so long, Remainder to the said Trustees, and their Heirs, during the Life of the said A. but in Trust for the Heirs of the Body of the said A. lawfully to be begotten; and after the Determination of that Estate, and the Death of the said A. then to the only Use of the Heirs of the Body of the said A. like Remainders to B. and C. and D. with like Limitations to the Heirs of their Bodies, Reversion to a Stranger in Fee. Grantor dies, M. enters, and has a Son that attains to Twenty-one Years of Age; the Mother and Son cannot, in this Case, suffer a Common Recovery, and thereby bar the Remainders; for the Remainder to the Heirs of the Body of M. being supported by the Freehold limited to the Trustees, was a contingent Remainder, and

and no Entail executed ; and so no Recovery can be where there is no Entail.

It is true a Common Recovery would bar the contingent Remainder, if the Trustees, who were in Trust for the Heirs of her Body, joined ; but that would prejudice M. and her Son ; for on her Death, he that has the next Remainder vested, would have the Estate ; so the barring the contingent Estates, would be no Advantage, but a Disadvantage to M. and her Sons, and all the contingent Remainders.

A Common Recovery bars not a contingent Executory Estate. So if one have an Estate in Fee, determinable on a Limitation or Condition ; as if Lands are given to A. and to his Heirs, until B. pays him 100*l.* and then to remain to B. and his Heirs : A. suffers a Common Recovery, this bars not B. but on Payment of the Money he shall have the Land. *Palm.* 132. *Brid.* 3. So if a Writ of Entry be brought against the Mortgagee,

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Mortgagee, and he suffers a Common Recovery, this bars not the Mortgagor; but if the Mortgagee vouch the Mortgagor, it is good, but it is no bar, unless he be vouched. 2 Roll. Rep. 222, 2 Cro. 592. 1 Keb. 30.

If one has an Estate for Life, with Power to make a Jointure, and suffer a Common Recovery, his Power is extinguished; for the Estate to which the Power was annex'd, is gone and forfeited by the Recovery. *Aliter* of a collateral Power to make Estates; as where Executors had Power to sell. Vent. 225, 226. 1 Mod. 111. 1 Keb. 31. 3 Keb. 291.

Lease for Life to A. Remainder to B. in Tail, Remainder to C. in Tail, Remainder to the right Heirs of A. Proviso that A. shall have Power to make Leases in Possession, Reversion, or Contingency, to commence after Death of B. without Issue. A. makes a Lease for Years, to commence after the Death

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Death of B. without Issue, B. suffers a Common Recovery, this bars the Lease, *Raym.* 236. So if an Estate be limited to one for Life, Remainder to his first and tenth Sons in Tail Male, and for want of such Issue, to Trustees for 500 Years. If any Tenant in Tail in Possession, suffer a Common Recovery, the Remainder for 500 Years is barr'd. *Sid.* 102. 1 *Keb.* 452. 3 *Keb.* 488.

139.6
see post 170.

One made a Gift in Tail, determinable on the Donee's Nonpayment of 100*l.* Remainder to B. in Tail: Tenant in Tail, before the Day of Payment, suffers a Common Recovery, and after pays not the Money; yet because he was Tenant in Tail, when he suffered the Recovery, all is barr'd. 1 *Mod.* 111. 1 *Keb.* 31. 3 *Keb.* 291.

A Term subsequent to the Estate Tail, as to rise after Failure of Issue Male, is barrable, as has been said before, by Common Recovery; but if a Man make a Lease for 100 Years to B.

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B. to commence after the Lessor's Death, without Issue Male, in Trust for Payment of Daughters Portions, and after, by another Deed, limits the Lands to the Use of himself for Life, Remainder to his first and other Sons in Tail, a Common Recovery bars not the Term for 100 Years; for the first Term was precedent, and the Estate created by different Deeds, but by the same Deed *Alit'*. And the Case of *Goodier and Clarke*, 1 Lev. 35. was a Settlement in Consideration of Marriage, and a 1000*l.* to the Use of the Husband for Life, Remainder to his first, second and tenth Son in Tail Male, and if he died without Issue Male, Remainder to the Use of his Daughters, for a Term of Years to raise 1500*l.* Remainder over. The Husband has a Son and Daughter, and dies, the Son died without Issue, so the Land remained over, according to the Settlement; and there held, the Son might have barr'd

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this

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1 Keb. 73,
78, 169, 246.
Sid. 102.
1 Vent. 229.

But *Quere* if
such Lease be
good to com-
mence after
Failure of
Issue.

this Term by a Common Recovery ; but it is plain the Case was not rightly stated ; for it seems this Term created for Daughters Portions, was in another precedent Deed made before the Settlement, and then could not be barred. 1 Keb. 462. And so held by the Lord Chief Justice Holt, *Andrews* ver. *Stroud*, T. 5 *Anne*, B. R. So the Difference is, when the Term is precedent to the Entail, and when subsequent ; so is *Hudson's* and *Benson's* Case, 2 Lev. 26. but better reported 1 Mod. 108.

A. covenants to levy a Fine to the Use of himself and the Heirs Male of his Body, Remainder in Tail to several others, Remainder to his own right Heirs, provided always, and if it shall happen that there be a Failure of Issue Male of his Body, and *Anne* his Daughter be married, or of the Age of Twenty-one Years, then she to have 200 l. a Year for ten Years. Tenant in Tail dies leaving Issue Male, who enters

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enters and makes a Lease for a thousand Years, and levies a Fine, and suffers a Common Recovery, and dies without Issue; *Anne* was Twenty-one Years old, and held the Rent of 200 *l.* per Annum, well barr'd by the Common Recovery, because the Remainder out of which it issued, is barred. 3 *Keb.* 274, 287, 292. *Raym.* 236. 1 *Mod.* 108. 2 *Lev.* 28. *Cro. El.* 769.

If a Gift in Tail is made, rendring Rent, and Tenant in Tail suffers a Recovery, this bars not the Rent, but it remains as a collateral Charge on the Land, distrainable of Common Right; but if there had been a Condition of Re-entry for Nonpayment, the Condition had been gone. *Cro. El.* 727, 768, 769. *Jenk. Cent.* 413. 3 *Leon.* 261. 2 *And.* 170. 2 *Lev.* 30. *see ante* 136.

If the Issue in Tail comes in by Title Paramount, the Recovery of his Ancestor bars him not, 1 *R.* 96. *a.*

If Baron be seised in Tail, *Jure Uxoris*, Remainder in Tail to B. Remainder to C. Baron bargains and sells the Land, and a *Præcipe* is brought against the Bargainee; this bars all the Remainders, but not the Feme. 2 *Rol. Abr.* 394.

If A. be Tenant in Tail, Remainder to B. in Tail, Remainder to C. in Tail, A. makes a Feoffment, Feoffee suffers a Common Recovery, and vouches B. his Entail and all subsequent Remainders and Reversions are barred, but not the first Entail to A. 3 *R.* 6.

If an Estate be limited to a Man and the Heirs Male of his Body, as long as such a Tree stands, a Common Recovery bars this Estate, 1 *Mod.* 111. 3 *Keb.* 392. If Tenant in Tail levy a Fine with Proclamations, and after the Proclamations, suffer a Common Recovery; though by the Fine with Proclamation, the Estate was well barred, yet this bars the Remainder, tho' there

there was no Estate Tail at the Time of the Recovery. 2 *Rob. Abr.* 394.

Cro. El. 388. *Acc. W. Jo. 74. 1. R. K. 223.*

Feoffment to the Use of himself for Life, Remainder to his first Son in Tail Male, and before a Son is born Tenant for Life suffers a Common Recovery, and after a Son is born he cannot avoid it, because Remainder not *in Esse*; and for that Reason it should not bar, because Remainder not being *in Esse*, the Recompence cannot extend to it, 2 *Leon.* 224. *Moore* 201. But the true Reason is, because the Remainder was contingent, and the Estate on which it depended gone; and a Fine or Feoffment in this Case, would have destroyed the Remainder, as well as a Common Recovery; so if Remainder be in Abeyance. 6 *R.* 42. a.

An Estate was settled by A. to the Use of himself for ninety-nine Years, if he live so long, Remainder to B. for ninety-nine Years, if he live so long, Remain-

in the case of Barton, which is the same as that in Cro. El. 388. the co. 200. not suffer him to argue the contrary. See Cruise on Comm. Recov. as to same point. 200. to 203. 2. N. H. 200.

Remainder to Trustees to preserve contingent Remainders, Remainder to the first and other Sons of B. Remainder to the right Heirs of B. B. has no Issue, he and his Trustees join in a Feoffment, this bars the Remainder to the right Heirs of B. and his first Son, if any born after; for these Remainders were contingent; but if the Remainder had been to the right Heirs of A. it had been his Antient Reversion. *Pigot and Pigot, in Canc. Mich. 12 Ann.*

CAPUT VII.

Of Vouching and Recovery in Value.

WHEN the Tenant to the *Præcipe* has a Writ of Entry brought against him, in order to suffer a Common Recovery, he appears either in

in Person or by Attorney, and takes upon him the Defence of the Land, and vouches to Warranty, that is, alledges he had the Land of another, who in the Conveyance thereof, bound himself to warrant, and make good the Title; so prays that Party may be called in to defend the Title; and this, in Law, is called a Voucher, which, as my Lord Coke describes it, is when the Tenant calls in another into Court to defend the Land, or otherwise to have other Land of him of the Value of the Lands lost, by Reason of his Warranty; and he who vouches is called the Voucher, and he who is vouched the Vouchee; and if the Vouchee be in Court, he immediately enters into Warranty; but if he be not in Court, then goes out a *Sum' ad Warr'*, and then the Entry is *vocat' inde ad Warr' A. B. Sum' in Com' predicto & habeat eum hic a die, &c. per Auxilium Cur' idem' dies dat' est partibus pred' hic, &c.* And though in the Case
of

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of Common Recoveries, the vouching and every Thing else seems to be Matter of Form, yet the shewing the Nature of Voucher in Adversary Writs, will illustrate this Matter.

At Common Law all were to appear in Person, before Justices in Eyre ; and therefore if the Vouchee were not there the first Day, he was amerced, See Stat. of Marlbridge, 27 Westm. 1. cap. 39. and 10 Ed. 1. *de Vocatis ad Warr'*, 14 Ed. 2. c. 18. and what Alterations they have made in the Common Law.

In all Possessory Actions, if the Tenant vouches to Warranty, and the Demandant counterpleads the Voucher, and will aver the Tenant or his Ancestors, whose Heir he is, was the first that entred, he shall be received in all Writs of Entry that make mention of the Degrees, none shall vouch out of the Lien ; but if a Disseisor makes a Lease for Life, Remainder in Fee, Disseisee brings a Writ of Entry in the

Per, against Lessee for Life, who makes Default, and he in Remainder is receiv'd, he may vouch out of the Degrees, and a Voucher is properly on a Feoffment with Warranty; but on a Release with Warranty, the Party is put to his *Warrantia Charta*. M. 12 H. 7. 3.

Præcipe quod reddat against A. who vouches B. who enters into Warranty, and after the Demandant releases all his Right to A. A. cannot plead this, for the Continuance in Court is between the Demandant and Vouchee; but the Vouchee may plead it, or a Release to himself. T. 5 H. 7. 39, 40. *Jenk. Cent.* 100.

In some Cases a Man may vouch himself as Formedon against Husband and Wife, they vouch the Husband, and shew for Cause, that the Father of the Husband enfeoffed certain Persons, who gave the Land to Husband and Wife in Tail, and vouch the Husband to save the Entail, M. 11 H. 7. 7. And

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in

in all Cases where a Man vouches himself, he must shew Cause, *M. 1.2 H. 7.3.*

Præcipe quod reddat against one who vouches himself to save an Entail, and the Voucher accepted, and a *Sum'ad Warr'* issues, and Summons returned, Vouchee makes Default, Tenant appears, Grand Cape awarded, for it is in the Degree of another Person, tho' vouches himself, *P. 42 E. 3. 16.* And in some Cases the Vouchee may vouch the Demandant himself; as Affize of *Mort-auncester*, by *Isabel* in *London*, who vouches a Foreigner, and the Record sent into the Common Pleas, and Process against the Vouchee, who enters singly into Warranty, and pleads that one *Alice* was seised in Fee, who took the Vouchee to Husband, and had Issue *Isabel* the Demandant, and *Alice* is dead, and the Vouchee Tenant by the Curtesy, and prays in Aid of him, *41 E. 3. 7.*

The Tenant vouches *J. Pinsar*, and on the *Sum' ad Warr'*, *J. Pinsar*, Chaplain, appears and demands the Lien, Tenant pleads it is not the same Person, the Demandant prays Seisin of the Land, and the Counter-plea held ill, for after Voucher granted, the Demandant shall not have Counter-plea; and it is not Reason that by a Stranger's appearing the Tenant should lose his Warranty, and a *Capias ad Valentiam* awarded against the true *J. Pinsar*, *Pascha*, 45 *Edw.* 3. 6.

Precipe quod reddat Tenant vouches two Heirs, and pleads one is under Age, and prays the Parol may demur; the Demandant replies, at full Age, and prays an Inspection and Process till the *Sequatar sub suo periculo*, and at the Return does not appear; the Demandant prays Seisin of a Moiety, and a *Sum' ad Warr'* for the other Moiety, *T.* 45 *E.* 3. 23. If two are vouched, and one makes Default, a *Capias ad Valen'*

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issues of all against him that made Default.

And the Method used for Recovery of Land on Voucher in Adversary Writs, is to be observed, since it conduces much to the Understanding the true Reasons Common Recoveries are grounded on. If the Vouchee be not in Court, then a *Sum' ad Warr'* goes out, and if the Sheriff return the Vouchee summoned, and he make Default, then a *Capias ad Valentiam* goes out for the Tenant ; but if on the *Sum'* the Sheriff return *Nil*, an *Alias*, and after a *Pluries* go out, and then a *Sequatur sub suo Periculo* issues ; and if Vouchee makes Default, Judgment shall be given for the Demandant to recover the Land, but no Judgment for the Tenant to recover in Value, because it appears Vouchee had not Assets, 1 *Inst.* 101. So if a Summons be returned, and a Default made, and a *Capias ad Valentiam* issue, and a *Nil* is returned, an *Alias* and *Plus Pluries* issues,

sues, with a *Sequatur sub suo Periculo* on the *Pluries*. If on the Return of the *Ca' ad Valentiam*, the Vouchee makes Default again, Judgment shall be given for the Demandant against the Tenant, and for the Tenant against the Vouchee; and in short, the Process to call in the Vouchee is a *Sum' ad Warr'*, if the Sheriff returns a Summons, and Vouchee makes Default, then a *Magnum Cape ad Val'* goes out, and if on it he makes Default, Judgment is given against him, and that he shall have in Value against the Vouchee, but if Vouchee appears and makes Default, then a *Parvum Cape ad Val'* goes out, and on another Default, Judgment as before; but if the Sheriff returns *Nil*, then an *Alias & Pluries & Sequatur sub suo Periculo*, and the Tenant has no Recovery over, as has been said before; if there be a Default of the Vouchee at the Return of the *Sequatur sub suo Periculo*, then the Tenant must be call'd, and if he make

1

Default,

Default, a *Petit Cape* is awarded, and no Judgment till the Return, *Kel.* 41. If the Sheriff return not the Writ through the Tenant's Default, Demandant may pray Seisin of the Land. On every *Sum' ad Warr'*, in Adversary Writs, there must be nine Returns between the *Teste* and *Ret'*; but the Practice is otherwise in Common Recoveries, by the Stat. 16 Car. 2. c. 6. *vide post.*

At Common Law, as appears by the said Statute, were nine Returns, the Words are these, " And whereas before the making this Act, all Writs of *Sum' ad Warr'* against Vouchees upon Common Recoveries had in Writs of Entry and Writs of Right of Advowson, had nine Returns, inclusive; now for the more speedy perfecting such Recoveries, be it Enacted, That all and every such Writs of *Sum' ad Warr'* upon the Appearance of the Tenant to every such Writ of Entry or Writ of Right of
" Ad-

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“ Advowson, shall and may be made
“ and abridg’d to five Returns, as Writs
“ of *Sum’ ad Warr’* in Writs of Dower,
“ *unde nil habet.*”

The Returns are not abridg’d in this Case in *Ireland*, but they are never observed; for where the Voucher appear by Attorney, they make them appear *gratis*, instantly, without any Day given; and though this is assignable for Error, yet upon search, the Precedents appearing all uniform in this Point, it may be said *Communis Error facit Jus*; and therefore it has not been thought advisable to bring a Writ of Error on this Defect.

If two enter into Warranty, and one dies, the Lien does not survive, but his Heir shall be summoned with the Survivor. T. 17 E. 3. 41.

Tho’ in Common Recoveries, which are always by Assent of Parties, the Vouchee never demands the Lien, yet he may, and then his Warranty extends
no

no farther than the Lien, as appears by *Plowd. Manxwell's Case. 2 Brownl.*

171. But if without demanding the Lien, one enters generally into Warranty, there shall be an Execution of all Warranties, and it binds all Rights.

If Tenant in Tail vouches in an Adversary Action, and recovers in Value, and has Execution, and after the Recovery is falsify'd by him, and he has the Land again, yet he shall retain the Land recovered in Value for fear of future Loss, because his Warranty is determined; for when he has had Judgment and Execution, he has had the Effect of his Warranty, and can vouch no more on that Warranty, 10 R. *Mary Portington's Case. Hob. 27.*

CAPUT

CAPUT VIII.

Of Execution, and the Estate the Recoveror has by the Recovery.

AFTER the Demandant has Judgment in a Common Recovery against the Tenant, and the Tenant against the Vouchee, and the Vouchee against the common Vouchee, the Court awards a *Habere fac' Seisinam* to the Sheriff of the County where the Lands lie, which is returned, and so the Recovery compleat and executed. And though this is not much regarded, being only Matter of Form, yet in many Cases it is not safe to proceed 'till there is a Return of the *Habere fac' Seisinam*; for whenever a Recovery is to Uses, as all Common Recoveries are, no Seisin is in the Recoveror, no Use raised,
X 'till

'till the Execution of the Recovery ; for

See ^{acc.} W. Ja. 10. pl. 10. till then the Land passed not. Moore 281.
1. lo. 9 46. 106. 6. T. 7 H. 4. 17. So that till then no Use

1. Co. 9 46. 106. 6.

T. 7 H. 4. 17. So that till then no Use
arising, the Party to whose Use the Com-

mon Recovery is declared to be, can
convey nothing, for *Nemo dat quod non
habet.* *It is however, out of* ^{from} *which the use in* ^{the} *trades, doth not*

If Tenant in Tail suffer a Common Recovery, and dies before Execution, Execution may be sued against his Issue.

Plowd. 55, 375. 1 R. 6. If Lands be
conveyed to A. and his Heirs, with

Warranty, and the Grantee suffer a
Common Recovery to the Use of him

and his Heirs, it is but the old Estate in Degree and Privity, as before. So if

Lands be conveyed to A. in Fee, with
Warranty to him, his Heirs and Assigns,

and A. suffers a Common Recovery to
the Use of a Stranger, the Recoveror may

you as Assignee, *Hob. 27.* And when-
ever a Common Recovery is suffered by

a Man to his own Use, he is in the
Estate as he was before.

of such a convergence of the future Tenant
relations, which the execution of a new

See as to this latter doctrine Shelley's case
10. 10. See as to the former doctrine 1 Co. 102. b.
^{for execution}
that the statute abuses and speaks not only

Tenant in Tail mortgages his Lands, and after suffers a Common Recovery to make a Jointure, this Recovery extends the Estate Tail, and lets in the precedent Mortgage in Prejudice of the Jointure; because the Recoveror comes in in Continuance of the Estate Tail, and subject to all Incumbrances of Tenant in Tail; and in this Case the Court of Chancery will not relieve.

1 Chan. Rep.^{Cas.} 120.

Recoverors in Common Recoveries, their Heirs and Assigns, by the Statute 7 H. 8. c. 4. have like Remedy against Lessees for Lives and Years, by Distress, Avowry, and Action of Debt for Rents and Services that shall be due after Recovery, as the Party had before; and also like Actions of Waste, and on Disturbances in Presentations, as the Lessor had.

If a Man make a Lease for Years to begin at Michaelmas, reserving Rent,

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and before *Michaelmas* suffers a Common Recovery ; the Recoveror shall, in this Case, distrain for the Rent which Lessor before the Recovery could not.

1 *Inst.* 104.

CAPUT IX.

Of falsifying Common Recoveries.

A Common Recovery may be defeated, frustrated and reversed, which is call'd falsifying, many Ways, as by Entry and Plea, by Action, by Action and Plea, by Plea only. By Entry and Plea, when the Party's Entry is not taken away by the Recovery, and he brings his Assize, and the Recovery is pleaded against him, and he pleads Matter to avoid the Recovery : But to clear these Points, let us see who may falsify in an Adversary Recovery. If
one

one be ousted by Covin, between the Demandant and him that ousts, the Tenant and Demandant brings an Assize against the Party that ousted the Tenant, the Tenant may have an Assize; and on the Special Matter shewed, shall avoid this Recovery.

By Action and Plea, that is, when the Entry of the Party that has Right, is taken away by the Recovery, and on a real Action brought, the Recovery is pleaded in Bar of the Right, this may be falsify'd by Plea, and so by Action only, or by Plea only.

The Causes for falsifying Recoveries, are Covin, an elder Right or Title, Want of Jurisdiction in the Court, Warranty and Assets, a Release, Feint pleading, no Tenant to the Freehold, or Want of Estate in the Tenant; to make out which, see the following Authorities.

Sci' fac' on a Judgment in a *Cessavit*, against a Parson, who prays in Aid of the Patron and Ordinary, who makes
Default,

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Default, and on the Default, Judgment given; and now to the *Sci' fac'*, the Parson pleads *Non Cessavit*; and by *Martin* and *Paston*, he shall not falsify this Recovery against his Predecessor, but is put to his *Juris Utrum*, 10 H. 6. 5, 6.

Sci' fac' against an Abbot, on a Judgment in an Annuity had against his Predecessor, the Abbot pleads that his Predecessor confess'd the Judgment, when he had a Release of the Annuity; and *per Cur'*, He shall not thus avoid the Recovery; for his Predecessor had the Fee-simple, and not like a Parson who is *Quodammodo* Tenant for Life, who shall avoid it, where it is without Aid pray'd of Patron and Ordinary, 30 H. 6. 45, 46.

Annuity against a Parson who prays in Aid of Patron and Ordinary, who makes Default, and the Parson tries the Title, and loses, this binds the Successor, and he shall not falsify the Recovery in the Point tried, though all the

Jury be dead, so that he cannot have Attaint. 34 H. 6. 2. b. 10.

Affize; Tenant pleads in Bar a Recovery in Dower; Plaintiff replies, that the Lands demanded are in the *Cinque Ports*, *Ubi breve Domini Regis non currit*, and held the Plea ill; for Judgment at *Westminster*, for Lands in the *Cinque Ports*, good; *Aliter* of Lands in *Wales*. 36 H. 6. b. 32, 33.

Writ of Forcible Entry, the Plaintiff makes Title by a Recovery in a Writ of Right against the Lessor of the Defendant; the Defendant pleads, that at the Time of the Writ of Right brought, his Lessor had aliened the Reversion to A. to whom he attorn'd, and held good. 1 H. 7. Pl. 7.

A Parson made a Lease for Years, and afterwards in a *Quare Impedit* brought against him and the Patron, they pleaded feintly, Lessee shall not falsify, because if the Parson had resigned, the Lease had been gone. T. 26 H. 8. Pl. 3. En-

Entry in the *Post*, the Tenant vouches, and the Vouchee makes Default, and Lessee for Years of the Tenements, prays to be received on the Statute of *Glouc'*, because Vouchee is now Tenant; and by the Statute of *H. 8.* if he is not received, he may now be admitted to falsify. 27 *H. 8. Pl. 20.*

Note, Where it is said in the old Books, that Privies cannot falsify in the Point tried, that must be understood in a *Sci' fac'*, on the same Judgment, or in another Action of the same Nature; but in an Action of a higher Nature, the Parties may try the same Thing again; and there is a Difference where the Parties have not the absolute Fee in them as Parsons, Prebendaries, &c. there the Successor is not bound; but in Actions of the same Nature, may falsify, or have *Juris Utrum*; but where, by the Common Law, they have the mere Right as Bishops, &c. there they cannot falsify. 6 *R. 8. a.*

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Father Tenant in Tail, enfeoffs his Son, and disseises him, and levies a Fine, the Son enters before Proclamation past, and enfeoffs A. who makes a Lease for Years to B. the Issue in Tail, on a Formedon, recovers on a feint Defence. B. brought an Ejectment, and held that he might falsify the Recovery in the Formedon. 2 Cro. 589, 610. Moore Pl. 503. Owen 15. Disseisor makes a Feoffment in Fee, the Feoffee leases for Years, Disseeise recovers against Disseisor in an Assize; on a *Nil' tiel tort* pleaded, Lessee shall be admitted to falsify in the Point try'd, and to plead that the Disseisor *Ne disseise pas*; for he is a Stranger, and at Common Law, every Stranger may falsify, because he cannot have Error or Attaint, and where he has Wrong, by natural Equity he ought to have Redress. 3 Cro. 284.

In Dower a Termor pray'd to be received for his Term made by Lease before the Coverture; and held by the
Y Court,

Court, that in this Case, the Judgment shall be general; but the Writ shall command the Sheriff to go to the Land, and to deliver Seilin to the Feme, but not to oust the Tenant; so that thereby Demandant has Reversion and the Rent. 3 Cro. 563, 564.

Tenant for Life, Remainder in Tail, the Remainder-Man makes a Lease for Years, to commence after the Death of Tenant for Life; a Common Recovery is suffered by Tenant for Life, who vouches him in the Remainder, the Lessee for Years may falsify. 3 Cro. 718.

Where it is said in the Books, one shall not falsify where he is Party, it hath three Exceptions; first, if the Party can shew that the Recovery was void in Law; secondly, if the Recovery was of Lands in D. and they lie in C. thirdly, if the Recovery were on a Writ that is abated. 2 Cro. 466.

Tenant in Tail acknowledges a Statute and dies, a *Sci' fac'* is brought against

gainst the Issue, and the Sheriff returns him Tenant of the Land, and he appears to the Writ, and pleads *Rein per Discent*, and Verdict against him, and before Judgment leases to B. he cannot in this Case falsify; for here, by this Judgment, the Issue is bound and chargeable with the Statute; and he being bound, his Lessee that claims under him is bound also. The Case is well argued, 3 *Bulst.* 345. where are many good Cases put about falsifying Recoveries. *Rol. Rep.* 424.

As to Tenant in Tail, it is held in all the Books, that the Issue in Tail shall never falsify in the Point tried; and therefore if a Recovery be against Tenant in Tail, and a *Nient Dedire* pleaded, the Issue has no Remedy, but by Attaint; but if the Verdict be on a collateral Matter, and not on the Title, or by Default, he may falsify. *Brooke, Title Fauxifier Recovery, Pl. 4.*

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A Man recovers Lands, and brings a *Sci' fac'* against M. N. and after brings a *Sci' fac'* against J. Tertenant, who pleads M. N. was not Tenant at the Time of the first *Sci' fac'* brought, *nec unquam postea*, but one B. whose Estate the Tenant now has, so the Recovery void, and held a good Avoidance of the Recovery; and yet *Non Tenure*, generally is no Plea. *Brooke, Fauxifier Recovery, Pl. 32.*

By the Stat. 21 H.8. c. 15. Tenants for Years, by Stat. *Merch. Staple* or *Elagit*, may falsify feigned Recoveries suffered by them in Reversion; and tho' none can falsify in the Point tried, yet in some Cases where the Party cannot have Attaint, he may; but none can in any Case falsify, without making Title, nor can he falsify who claims under him that suffered the Recovery.

These are the Rules laid down for falsifying Recoveries in Adversary Writs, and Common Recoveries may also in
many

many Cases be avoided. As if there be no Tenant to the *Præcipe*, or if the Writ is brought against a Stranger that had nothing, and he vouches Tenant in Tail in Possession, or because he that hath the Estate and Right, is not Party or Privy to the Recovery. As when a Writ of Entry is brought against the Disseisor, and he vouches a Stranger, or if another have a Term or Interest at the Time of the Common Recovery, there they may falsify to save their Interests; or if it be by Covin by Tenant for Life to disinherit the Reversioner; or if there be an Error of Substance in the Recovery, a Writ of Error lies.

And where a Common Recovery is avoidable, it must be avoided by him that is barred by the Recovery, as by the Issue of Tenant in Tail, or if none, by the Remainder-Man, or Reversioner by Writ of Error; and if Tenant for Life suffer a Recovery, he in Reversion may falsify during the Life of Tenant
for

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for Life, or after his Death. And whenever a Common Recovery is falsified, it is by Writ of Error, by Pleading, and in some special Cases, by Motion of Court

If an Infant reverse a Common Recovery for Nonage, he must do it under Age. 1 *Mod.* 49. *Sid.* 321. 1 *Lev.* 142.

See Stat. of *Glouc.* c. 11. that Lessees in *London* may falsify. 21 *H.* 8. c. 15. 2 *Inst.* 322, 323, 324.

CAPUT

CAPUT X.

Of Errors in Common Recoveries, and in what Cases Common Recoveries and Fines may be amended.

Common Recoveries being judicial Executions of the Agreement of Parties, the Law gives them all favourable Construction imaginable: And the Judges even extend their Power to serve the Parties Intentions; and the Courts at *Westminster* are ever ready to support them, where-ever they can, but yet so as to keep up the Form of judicial Proceedings, and not totally to introduce Barbarism, and encourage Ignorance. And for the Support of Common Recoveries, being Common Assurances of Land, the Stat. 23 *El. c. 3.* enacts, That no Common Recovery shall be reversed for false

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false or incongruous *Latin*, Rasure, Interlining, Misentry, Omission of the Return of the Sheriff, or any other Want of Form.

By the Stat. 10 & 11 W. 3. c. 14. No Fine or Common Recovery, or any other Judgment, unless Error brought in twenty Years; if Persons *infra*, &c. then within five Years after the Impediment removed.

A Writ of Error was brought to reverse a Common Recovery had at the Grand Sessions in *Wales*; and the Error assigned was, that the Summons is dated after the *Ded. potest.* and so no Warrant of Attorney at the Time of Appearance, but held good, *Sid.* 219. And in this Case the Court, to support the Common Recovery, will intend there was another Warrant of Attorney, *Raym.* 11, 34, 90. 1 *Keb.* 34. 1 *Lev.* 130. *Dyer* 220. *contra*, 1 *Leon.* 86. and in *Raym.* 71. held that the *Ded. potest.* is no Part of a Fine, though
 1 a War-

a Warrant of Attorney is of a Recovery ; but if the Party be dead, then it is ill. 2 *Vent.* 96. 20 *H.* 7, 9.

Writ of Entry *Ret' die Lune quart' Septiman' Quadagesim' prox' futur'*, shall be referr'd to the fourth Week next, not the next *Lent.* *Cro. El.* 389.

If the Vouchee die before Judgment, or be under Age, and appear'd in Person, or by Attorney, it is Error, 1 *Rol.* 301. *Dyer* 90. *Palm.* 224.

An erroneous Common Recovery is good till reversed, by Reason of the intended Recompence ; and if Tenant in Tail suffer an erroneous Recovery, and after disseise the Recoveror, and dies, his Issue shall not be remitted ; for the Recovery shall be presumed good, till it is reversed. 3 *R.* 3. 10 *R.* 38.

If he who suffers a Common Recovery levy a Fine, or make a Feoffment, he cannot have a Writ of Error to reverse it.

And Common Recoveries being only Common Assurances, the Court of Common Pleas does amend and supply the Defects of Clerks and Attornies in the entring up such Recoveries, or in Writs relating to the same. So a Common Recovery was agreed to be suffer'd, wherein *John Chapham* and *Richard Elton*, were to be Demandants, and by Mistake of the Clerk, the Writ of Entry was sued out in the Name of *John Chapham* and *John Elton*, and the Recovery suffer'd in the Name of *John Elton*, instead of *Richard*, and this Recovery amended, *Trin. 2 Car. 1. Chapham ver. Bacon.* The Rule for this Amendment is to be found in the Remembrance of Rules in *Foley's Office*, that Term, on the third Skin, and first Side of the same Skin.

A Warrant of Attorney was given in order to suffer a Common Recovery, by *William Reynolds*, and *Hester* his Wife; but the Serjeant that took the Warrant of Attorney, certifies the same

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to be given by the said *William Reynolds*, and *Margaret* his Wife, and the Mittimus and Transcript were made of a Warrant given by *Margaret*, and the Recovery entred accordingly, and all order'd to be amended. *Mich. 4 Car. 1.* the same Office, fifth Skin, on the Back of the same.

A Common Recovery agreed to be suffered by *Arthur Golding & Ux.* of Lands in *Alphamton*, & *Magna Hermny*, in *Com' Essex*, but by Mistake, the same was suffered of Lands in *Alphampton* and *Lamarsh*, and ordered to be amended in the Writs of Entry, Seisin and Entry of the Recovery, *M. 6 Car. 1.* *Skinner* versus *Laud*, the same Office, second Skin, the Back of the Skin.

A Common Recovery suffered by *R. Callow & Ux.* but the Name of the Wife totally omitted; and this order'd to be amended, *M. 8 Car. 1.* *Thurban* versus *Pantry*; same Office, third Skin, on the Back of the same.

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A Common Recovery was agreed to be suffered of Lands in *New Church*, *Levington* and *Mersham*, but *New Church* was totally omitted in the Recovery; and this upon reading the Indenture, ordered to be amended, T. 13 Car. 1. *Whetwell* versus *Masters*; same Office, second Skin, first Side.

A Common Recovery was agreed to be suffered of two Messuages and one Garden in *London*, and suffered only of one Messuage, and ordered to be amended, Tr. 13 Car. 1. *Brooke* ver. *Biddolph*, same Office, first Skin, first Side.

A Writ of Entry for a Common Recovery was sued out returnable in *Crastin' Animarum*, and a Recovery suffered thereon, but the Writ of Seisin made returnable, the same Return as the Writ of Entry, and this ordered to be amended, P. 16 Car. 1. *Doncaster* versus *Campion*, the same Office, third Skin, second Side.

A Deed

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A Deed to make the Tenant to the *Pracipe*, was executed, dated 1 Nov. 33 Car. 2. and Common Recovery suffered thereon, and the Writ of Entry made *Ret' tres Mich'*, before the Date of the Deed, and this ordered to be amended, and the Writ of Entry made, *Ret. Crastin' Animarum*, M. 4 W. & M. Bunce & al' versus *Greenway & al'*; This Rule is in the Remembrance of Mr. Borrett's Office.

A Deed was made to make a Tenant to the *Pracipe*, dated the 11 Nov. and a Common Recovery suffered, and the Writ of Entry made returnable *menſe Mich'*, before the Date of the Deed, and this ordered to be amended. *Mich. 5 W. & M. Wattry* versus *Jodrell*.

A Common Recovery had been suffered, and the Writ of Entry made *Ret'*, before the Date of the Deed, that led the Uses of it, and which made the Tenant to the *Pracipe*, and on reading the Deed, order'd to be amended. M. 5 W. & M. *Warkhouse* versus *Watts*:
This

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This Rule may be found in the Remembrance of Mr. *Cooke's* Office.

A Fine and Common Recovery were agreed to be levied and suffered of the Manor of *Inkfield*, in *Com' Salop*, and by Mistake, the same was made *Inglefeild*, and both ordered to be amended, viz. the Fine in the Record of the King's Silver, in the Foot and Note of the Fine, and in all the Places of the said Fine and the Recovery. In the Writ of Covenant, Writ of Entry, Exemplification, & *habere fac' Seisinam*, 9 W. 3. *Int' J. Fostre*, *Ar' & Ux.* And this Rule may be found in the Remembrance of Mr. *Cooke's* Office.

A Fine and Common Recovery agreed to be levied and suffered of Lands in *Cranley*, in *Com' Surry*, and by Mistake, the same was written *Crawley*; and on Examination of the Proceedings therein, and perusal of the Deeds to make a Tenant to the *Præcipe*, and declaring the Uses of the said Fine and Recovery,

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Recovery, the same were ordered to be amended in the several Parts of the Fine and Recovery, and in the Writs of Covenant, Entry and Seisin, *Tr. 4 Jac. 2. Int' William Freeman, Gen' Quer' & William Montague, Jun', Ar' & Ux' Deforc'*: This also may be found in the Remembrance of Mr. Cooke's Office.

A Common Recovery was agreed to be suffered of Lands in *Weston, in Com' Glouc'*, and by Mistake, written *Waston*, and ordered to be amended in the Record, and other Places of the said Recovery, and in the Writs of Entry, Seisin, *Ec. M. 11 W. 3. Int' Simon Smith, Ar' Peten' & Ric'um Comit' Dorset, & al' Tenen'*; which Rule may be found in the Remembrance of Mr. Cooke's Office.

If Tenant be present and vouch to Warranty *A.* and one appears for him, it is Error, and the Appearance void; for he ought to appear in Person, or else
a Sum'

a *Sum' ad Warr'* ; and where Summons is entred on the Roll, there, at the Return, the Vouchee may appear in Person, or by Attorney. 1 Leon. 86.

Page versus Hayward.

Trin. 3 Annæ, B. R.

*2 L. Rep. temp.
Galt 619.*

*1 L. talk. 570. & in same words
as is for as, talk. 570. & in same words*
Nicholas Searl devised to his Niece
Mary Bryant, and the Heirs Male
of her Body, upon Condition, and pro-
vided that she intermarry with, and
have Issue Male by one Surnam'd Searl;
and in Default of both the said Con-
ditions, he devised to Elizabeth Bryant,
[in the same Manner] and in Defect
thereof, he devised to George Searl for
sixty Years, if he so long live, Remain-
der to the Heirs Male of the Body of
the said George, and their Issue Male

for ever : *Mary*, and *Elizabeth* with her Husband, for she had then married one *Clift*, joined in a Fine to make a Tenant to the *Præcipe*, who was one *Isaac Savery* ; *Isaac Savery* vouched ~~*Mary Bryan*~~ ^{*Elizabeth*} ~~*Elizabeth Clift*~~ and her Husband, and the Wife of the Devisor with her Husband, she being again married, and vouched them all jointly, and they vouched over the Common Vouchee. *Et per Holt*, Ch. Just. & tot' Cur', adjudg'd, that first, the Estate devised to *Mary*, was a good Estate Tail, and so was the Estate to *Elizabeth* ; but it is a Special Entail, it is an Estate to her and the Heirs Male of her Body begotten by a *Searl*, which is a middle Entail, not the highest nor the lowest ; for it might have been to her and the Heirs of her Body begotten by *J. Searl*, which had been more particular, yet this is a good Estate Tail within the Statute *De Donis* ; for it is within the Reason of that Statute. *Co.Lit.26.b.*

A a

Secondly,

Secondly, The Words upon *Condition*, &c. though express Words of Condition, shall be taken to be a Limitation: So it is held 1 *Vent.* 199, 202. and *Holt* said he saw no Reason why they might not be so construed in a Deed, though the Law had not been carried so far; and so the Sense is, if she has no Issue by a *Searl*, upon her Death, without such Issue, the Estate shall remain over.

Thirdly, That the Estate Tail of *Mary* and *Elizabeth*, or either of them, does not cease by marrying one that is not a *Searl*; for the Remainder over is in Default of both Conditions; and in the mean time it is limited to her and the Heirs Male of her Body; and she may survive the first Husband, and after marry a *Searl*; and so there is a Possibility as long as she lives.

Note this

Fourthly, If the Estate had been to *Mary*, and the Heirs Male of her Body by a *Searl* to be begotten, provided and
upon

upon Condition she do marry any but a *Searl*, that then it shall remain and be to J. S. and his Heirs. A Common Recovery suffered before Marriage will bar the Estate Tail and Remainders; and tho' she after marry with another, it shall not avoid the Recovery. And the Court took a Difference between a Collateral Condition and a Condition that runs with the Land. If the Donor reserves a Rent, with Condition to re-enter, a Recovery will not bar it, *aliter*, if it be to re-enter for Nonpayment of a Sum in Gross. *Vide* 1 Mod. 108, 111.

2 Lev. 28. *ante* 136, 124, 126. 139.

And as to Common Recoveries being of great Use, the Chief Justice desir'd to speak largely.

First, If Tenant to the *Præcipe* vouches Tenant in Tail in Possession, and him in Remainder jointly, and they jointly vouch over the Common Vouch-
chee, this is good; not but it may be more regular that the Tenant vouch

See
Ante acc. 2. *Ante*
cap 591. *See*
also Lord Mansfield
words A. Burr.
1941.

See *ante* 33
35, 36.

Mary ~~Bryant~~ ^{Elizabet}, and she Elizabeth, and she over the Common Vouchee, that the Recovery in Value may not be joint but enure severally ; yet the other Way is sufficient, for where in an Adversary Action a *Præcipe* is brought against several, it is enough that one hath the Tenancy of the Land ; and if he would plead that he is sole Tenant, and traverse that the other hath anything, the Demandant may admit that, and proceed as to him, and the Writ shall only abate as to the rest. Also the others may disclaim ; and as joining a Stranger with the Tenant does not hurt, so joining a Stranger with the Vouchee, does not ; for he is but *in loco Tenentis*, a Tenant to the Warranty.

Secondly, If Tenant in Tail makes a Tenant to the *Præcipe*, and he vouches a Stranger, and the Stranger vouches Tenant in Tail, and he the Common Vouchee, that is good ; for his
being

being a Stranger is not material; because, in Judgment of Law, he is become Tenant by the Voucher to the *Præcipe*, and a Release to him is good, and the Voucher is good, whether there be a real Warranty or no. At Common Law, if a Stranger was vouched, the Demandant could not counter-plead it; by *Westm. 1. c. 4.* he may if he be absent counterplead the Voucher, *scil.* that the Vouchee and his ^{2 Inst. 244.} Ancestors, never had anything in the Land, but not if he be present. It is enough that Tenant in Tail comes in and owns a Warranty; for there may be a Warranty. Suppose an Adversary Action against Tenant in Tail, who has a Warranty, and he makes a Feoffment in Fee, with Warranty, or has levied a Fine with Warranty, and the Feoffee or Conufee vouch the Tenant in Tail, he may make Use of his Warranty, and yet he was not seised of the Estate Tail, but in that Case may deraign the Warranty,

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ranty, and then he recovers in Recompence as of his Estate Tail; for whenever Tenant in Tail comes in as Vouchee, he come in in Privy of all Estates he ever had, and consequently he may deraign the Warranty. *Vide 1 Inst. 385. 4.* Secondly, The Chief Justice said, the Vouchee's being a Stranger was not material, because, though there be no real Warranty, the Recovery in Value is the same, and the Admittance of Tenant in Tail has made it Real.

Objection: The Recovery in Value must be joint, as the Voucher is, and then it will not enure according to the Estates which are several. As to the second Point, the Case stands thus: Tenant in Tail, and he in Remainder in Tail join in making a Tenant to the *Præcipe*, and are jointly vouched, and jointly vouch over the Common Vouchee. Now my Brother Hooper objected that the Tenant in Tail, and he in the Remainder ought to have

*So far the
report here is the
same as in Falk.*

have been vouched severally, *viz.* Tenant in Tail first, and he have vouched over the Remainder-Man in Tail; for as that is, *viz.* as the Voucher was joint, the Recovery in Value must be joint; and so the Tenant in Tail, and he in the Remainder must recover Moieties in Value; whereas the whole was recovered against the Tenant in Tail, and consequently to bind the Issue, he ought to recover in Value the whole, and consequently the Recovery in Value not being proportionable to the Loss, the Common Recovery is not good; but if it had been in the other Way, he would have recovered the whole in Value.

In order to answer that Objection, he said he would consider three Things, the second was by Way of Preparation and Narrowing of the Point in Question, which would be the third; and he said that he was the larger upon this Matter, because it was of a greater Consequence. The

The first Thing (he said) was, That if a *Præcipe* were brought against Tenant in Tail in Possession, and a Stranger in an Adversary Action, and a Recovery was had, that this would be a good Recovery : He said, that what he said was the Opinion of us all ; he said, that indeed, the Issue in Tail might falsify if there was any faint Pleader ; and the Reason of the first Position, he said, was, because where a *Præcipe* was brought against several Persons, it was not necessary that they all should be Tenants of the Freehold, but if any of them were Tenants to the *Præcipe*, it was sufficient ; for if the Tenant in Tail would come in and take the Tenancy upon him, the joining of a Stranger with him in the Writ, would not have abated it, but the Demandant might admit the Tenant in Tail sole Tenant, and go on against him, and that would be good ; and the Diversities in the Books, he said, were, that

that in a *Præcipe*, &c. if one Disclaim'd, or made Default after Default, or said nothing, and the other took the whole Tenancy upon him, and pleaded in Bar, &c. the Demandant may accept him for his Tenant, and answer to the Bar; but if both take the whole Tenancy upon them, or several Tenancies of Parcel, the Demandant must of Force maintain his Writ; and for that he cited, among other Books, which I could not take, *Bro. Tit. Several Tenancy*, 13 E. 4. 2 H. 4. 22 H. 6. 55. 41 E. 3. 20. and brought many Authorities to prove it, *Br. & Fitz. Tit. Maintenance de brief*. And the Form of Pleading, in these Cases, he said, might be seen, *Rast.* 276. And if Bringing a *Præcipe* against Tenant in Tail and a Stranger, would not vitiate a Recovery, then of Consequence neither will a Joint Voucher; for by the Voucher, when the Vouchee comes in and enters into the Warranty, he is

21 E. 3. 10.
42 E. 3. 8.
44 E. 3. 33.
19 H. 6. 14.
28 Aff. pl. 25.
13 Aff. pl. 27.
Dyer 134.
pl. 11.

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as much Tenant in Law to the Writ, as if the *Præcipe* had been brought against him. And so the Case of a Stranger, being vouched jointly with him that has the Interest, will not differ from the Case of a Stranger being made Tenant in the Writ with the Real Tenant. 2^{dly}, There is another Reason why such a Recovery will be good, *viz.* because the Matter, that makes the Writ abatable, will not avoid it, if it be not pleaded in Abatement: As if a *Præcipe* be brought against one Jointenant, leaving out his Companion, if he plead the Jointenancy in Abatement, the Writ will abate; but if he plead in Chief, &c. and a Recovery be had against him, it will be good for a Moiety; and as to that, it is the very Case of the Marquis of *Winchester*, 3 Co. 3. a. b. where Baron and Feme Jointenants for Life, Remainder in Tail to the Baron, a *Præcipe* was brought against the Baron only,

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and

and he vouched the Common Vouchee; and *resolv'd* that though as well the Tenant as the Vouchee might have abated the Writ, yet when they, by appearing *gratis*, admit the Writ good, and the Recovery is had against them, it is a good Bar to the Estate Tail for a Moiety; but as to the other Moiety, it is no Bar, because there was no Tenant to the *Præcipe* as to that, and so the Recovery operates only by Estoppel, which will not bind the Issue in Tail; so here, this being only Matter of Abatement, there being no Advantage taken of it, the Recovery will be good. If a *Præcipe* against Tenant in Tail and a Stranger were good, a Voucher of Tenant in Tail and a Stranger, would be good too; because the Vouchee is Tenant in Law to the Writ.

The second Thing he said was, that suppose Tenant in Tail made a Tenant to the *Præcipe*, and a *Præcipe* was brought against Tenant to the *Præcipe*,

and he vouch'd a Stranger, who vouches Tenant in Tail, and he vouch'd over the Common Vouchee, that this would be a good Recovery; and that for these Reasons: *First*, suppose it an Adversary Action, if a *Pracipe* were brought at Common Law against J. S. and he vouch'd a Stranger, who never had any Thing in the Land, there was no Remedy for it; for the Demandant could not counter-plead the Voucher, till the Stat. of W. 1. c. 40. And this was a very great Inconveniency; for when a *Pracipe* was brought against the Tenant of the Land, he might vouch a Stranger, and so his Vouchee might, and so on *in infinitum*, which was an endless Delay; and so that Stat. gave the Counterplea, that the Vouchee, nor his Ancestors were ever seised of the Thing in Demand, by which they might have enfeoffed the Tenant or his Ancestors; but with this Exception, unless the Warrantor were present, and

and would *gratis* enter into the Warranty ; but if the Vouchee be absent, the Demandant may counterplead the Voucher, as before, because there will be a Delay to the Demandant by the *Precept*, which must go against the Vouchee ; and in Common Recoveries, to avoid Exceptions, the Vouchee is generally present. If a Stranger be a good Vouchee, then secondly, he is Tenant to the Writ, and pleads to the Right, *et defendit jus suum quando, &c.* and a Release to him by the Demandant, after he has enter'd into the Warranty, is good, and the Vouchee may plead it after the last Continuance, and it is as good as if it had been made to the Tenant himself ; and it is not material whether there was any real Warranty twixt the Tenant and the Vouchee ; but when that has been once admitted upon Record, since there might have been a Warranty between them, it is all one as if there had been ; and this
might

Co. Lit. 265. b.

might be collected from the Cases of Common Recoveries, 3 Co. if they were observed. If Tenant in Tail is disseised, and a *Præcipe* is brought against the Disseisor, who vouches Disseisee; that will bar the Estate Tail, &c. and yet here is no Warranty between the Disseisor and Tenant in Tail; for though there was none, yet seeing there might have been one, for the Disseisee might have released to the Disseisor, with Warranty, now it is admitted on Record, it is all one as if there had been a Warranty; and the Disseisee Tenant in Tail coming in, in Right of the Entail, the Estate Tail, &c. is barred: I suppose this to be an Adverse Action. Tenant in Tail with Warranty makes a Feoffment in Fee with Warranty, or levies a Fine; the Tenant in Tail can never have his Estate Tail again, against his own Feoffment, &c. But yet if a *Præcipe* be brought against the Feoffee or Conusee, who
vouches

vouches Tenant in Tail, and he the Common Vouchee, the Tenant in Tail shall recover an Estate Tail, though he has parted with his Estate, and shall make use of the Recovery against him to deraign the Warranty Paramount; and the Reason is, because all the while there might have been a Warranty, and it is supposed in the Recovery; and so where a Stranger is vouched, and vouches over Tenant in Tail, and he over the Common Vouchee, that will be good, because there might have been such real Warranties. Feoffee with Warranty to him, his Heirs and Assigns, makes a Gift in Tail, the Remainder in Fee, the Donee makes a Feoffment in Fee, the Feoffee shall not vouch as Assignee, because he comes not in Privy of Estate; and so is *1 Inst.* 385. But if in that Case the Feoffment of the Tenant in Tail had been with Warranty, if he had been vouched he might have deraigned the War-

2 R. Abr. 394.
B. 3.

Warranty Paramount. If Tenant in Tail be attainted of Treason, and the King grants the Land to *J. S.* who bargains and sells to *B.* against whom the *Præcipe* is brought, and he vouches *J. S.* and he vouches over the Common Vouchee; that shall not bar the Remainders; for *J. S.* does not come in in Privy of the Estate Tail, and so none of the Remainders could be affected by the Warranty; but suppose the Patentee had vouched the next Remainder-Man; that had been a Bar to all the Remainders, because he in the next Remainder that was vouched, came in, in Privy of the Estate Tail; and this is warranted by the Case put in *Cuppledike's Case*, 3 *Coke* 6. *a.* That if *A.* be Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, the Remainder to *D.* in Fee, *A.* makes a Feoffment in Fee, the Feoffee suffers a Common Recovery, in which *B.* is vouched, and he vouches over the Common
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mon Vouchee; in this the Estate Tail of *A.* is not barred, but *B.* and all the Remainders over are barred : And so, by the same Reason, if the Patentee had vouched him in the next Remainder, in that Case in *Rolle*, the Common Recovery had been a Bar. But it is objected, that the Vouchee had nothing in the Land; but to that I answer, that he has entred into the Warranty, and by that has subjected his own Heir to render the Value, and the Tenant in Tail who was vouched, comes in in Privy of the Estate Tail, as much as where the Tenant in Tail has made a Feoffment, or been disseised, and during the Disseisin, &c. is vouched; and it is no Objection that there was no real Warranty in *D.* the Stranger and Tenant in Tail; for if that were a sufficient Objection, it would over-turn all the Recoveries, and consequently unsettle all the Estates in *England*; but the Warranty is admitted upon Record, and being so

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admitted

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admitted between Persons that were capable of having made such a Warranty, it is all one as if there had been really and in Fact such a Warranty ; but then it is made a Question, what Estate the Stranger shall recover in Value ; and to that I answer, that he shall recover a Fee-simple ; for the Tenant in Tail and his Heirs are estopped by the Record to say that the Stranger had not any Estate in the Land ; and if they cannot assign any special Estate, that he had not a Fee-simple, and this Estoppel will be of Avail, for it does not affect the Estate Tail, but the Assets in the Fee-simple. I have mentioned this Matter, because it may be of very good Use to have Recoveries in this Manner, for those that purchase an Estate of a Family may have a very good Title upon the Foot of one Settlement ; yet there may be latent Settlements in the Family, and so it is the wisest Way for a Purchasor to bring in as many of the Family as he

he can, and vouch them all. To the Third, which was the second great Point, he said that the great Difficulty of it was upon the Account that the Recovery in Value must not be proportionable to the Loss; for by the Joint Voucher, the Recovery in Value must be Joint; whereas the Vouchees were Tenants in Tail of the whole, the one in Possession, the other in Remainder; and this indeed would be a great Objection, if the Case were considered upon the Foot of the Estoppel, for the Tenant in Tail will be estopped during his Life, to claim any more than a Moiety of the Recompence in Value; but then after his Death the Issue in Tail will not be estopped, but may say that the other was Tenant in Tail in Remainder, had not any Estate in Possession in the Land, so the Recompence will enure to him alone; and there is no Difference between this Case and the Case of *Eare versus Snow*

in *Plow.* 514. where the Husband was Tenant in Tail of Lands, and a *Præcipe* was brought against him and his Wife, and they vouched over the Common Vouchee, and the Recovery was held to be good ; for there it was objected that the Recompence in Value, which was the Cause of the Bar, should by the Surviving of the Wife go to her by Conclusion, and so no Reason to bar the Issue in Tail ; but it was held that the Issue in Tail should not be bound by any Estoppel, which his Father admitted by joining in Voucher with his Wife, any more for the Recompence in Value, than he should be by an Estoppel made by his Father, for the old Entail Land which is recovered against his Father, but was abateable against the Wife, to say that she had lost nothing, and that his Father was sole Tenement in Tail, and she had nothing. *Cro. El.* 376. *b.* and that he being the Person that had lost the whole,

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whole, should have the whole Recompence, and that of the same Estate that he had lost, and the Feme should have nothing. There was a Case in Trin.

1657. Rot. 179 or 180. between Murrell and Osburn, a Report of which I have under my Lord Chief Justice *Bridgman's* own Hand in a Manuscript I have of his, where this very Point came in Question. My Lord Ch. Just. *Bridgman* was a very studious Gentleman, and though he kept to his Chambers, yet he had an Account brought him of all that past in the Courts. The Case was in a *Formedon* in Remainder expectant upon an Estate Tail; the Tenant in Tail pleads in Bar a Common Recovery on a *Præcipe* against the Grantee of Tenant in Tail, in which Tenant in Tail and a Stranger were jointly vouched, and vouched over the Common Vouchee; and it was resolved that this was a good Recovery, and bound all the Remainders: And *Bridgman* men-

tions.

*J. C. 1. Bridgman.
Mss. Rep. 118.*

tions the Case 22 H. 8. *Br. Recovery in Value* 27. is to the same Purpose; there the Feme was Tenant in Tail, and a *Præcipe* was brought against Baron and Feme, and they vouched over the Common Vouchee, and the Estate Tail was held to be barred; and there it is held, that though the Husband surviv'd, yet the Recovery shall bind the Issue in Tail; for the Recompence shall go as where the Land recovered should have gone; this is full to the Point; for the Husband is as much a Stranger to the Wife's Estate Tail as any Body; and so in *Eare* and *Snow's* Case, is the Wife to the Husband's; and the only Diversity between the two Cases is, that in the Case in *Br.* the Husband must be nam'd, but in that in *Plow.* the Wife need not. He said there was a Case adjudged in the late Times in this Court, *Lockyer* and *Palsfreman*, *Hill.* 1651. which was reported obscurely in *Style* 319. but he had a Report of it in the same Book of

*L.C. cited in
1. Bridgman's Rep.
110.*

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of my Lord *Bridgman's*, where Husband and Wife were seised of a Reversion in Fee expectant upon an Estate for Life, and made a Feoffment in Fee to make a Tenant to the *Præcipe*, but that happened to be void, because the Tenant for Life continued all the while in Possession; but there a *Præcipe* was brought against the Feoffee, and he vouched the Husband and Wife, and they vouched over the Common Vouchee, and that was held to be good; for if a *Præcipe* be brought against a Stranger, and he vouches Tenant in Fee-simple, the Recovery is good against Tenant in Fee-simple by Estoppel; but the Reason why such a Recovery is not good against the Issue in Tail is, because the Estoppel as to him is not binding; and if a *Præcipe* be brought against Baron and Feme, or Baron and Feme come in as Vouchees, the Wife is as much estopped as if she was a Feme Sole, and there is no Diversity as to the Estoppel,

*Cro. El. Webb.
v. Neft. 21.*

*10 Co. Mary
Portington's
Case.*

if Tenant in Fee-simple be Tenant to the *Præcipe*, or come in as Vouchee; and to that Purpose is the Case in 3 *Cro.* 21. where Tenant in Fee-simple expectant upon an Estate for Life bargained and sold to J. S. against whom a *Præcipe* was brought, and he vouched the Tenant in Fee-simple, and the Recovery was held to be good against him in the Reversion and his Heirs: He concluded with the Case in 1 *Inst.* 376. 2 *Cr.* 318. that if the Heirs at Common Law and the Heir in Burrough English be vouched, and vouch over the Common Vouchee, the Heir in Burrough English shall have the whole Recompence in Value, because he has all the Loss, and so of the Heirs in Gavelkind, &c. and so in the Case of *Eare* and *Snow*, the Wife, though surviving, shall have nothing, but the Issue in Tail shall have the whole Recompence in Value, because he lost the whole; so here, though there

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be a Joint Voucher, yet the Recompence in Value shall go only to the Issue of Tenant in Tail in Possession, and so successively; and consequently the Common Recovery is a good Bar. Judgment was given for the Defendant.

Trin. 6 Anna, in the Court of Exchequer, in Ejectment.

Lanc. ff. John Johnson, on the Demise of *John Earl of Anglesea*, and *Henrietta-Maria* his Wife, and Lady *Elizabeth Stanley*, Spinster, Plaintiffs.

James Earl of Derby, and Others his Tenants, Defendants.

OF *inter alia* the Manor of *Lathom* and several thousand Acres of Land in *Lathom*, and other Places

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in the County of *Lancaster*, on Not guilty pleaded on a Trial at *Lancaster* Assizes, the Jury found several general Verdicts as to Parcels, and *inter alia* as to *Cross-Hall* in *Lathom*, and all the Premisses, except the Residue of the Manor of *Lathom*, two thousand Acres of Land in *Lathom*, Parcel of the same Manor, the Manor of *Newburgh*, two hundred and fifty Acres of Land in *Newburgh* in *Lathom*, and *New Park* in *Lathom*: The Earl is found Not guilty; and as to the Particulars excepted, find a Special Verdict.

That *William* Earl of *Derby* was seised thereof in Fee, and being so seised, to the Intent that *Sir Thomas Leigh* and others might convey the same to *Queen Elizabeth*, her Heirs and Successors, and that the Earl might accept from the Queen a Grant to the Earl and the Heirs Male of his Body, and for Default of such Issue, to the Heirs Male of the Body of *Sir George Stanley*,

ley, formerly Lord *Strange*, and should leave the Reversion in the Crown, enfeoffed the said Sir *Thomas Leigh*, and others, and their Heirs.

And the said Feoffees, being by Virtue thereof seised in Fee, did, in Pursuance of the said Intent, by Deed inrolled convey the same the Eighth of *December*, 43 *Eliz.* to the Queen, her Heirs and Successors.

That Queen *Elizabeth*, in further Pursuance of the same Intention, the Seventh of *January*, by her Letters Patent, for divers good Causes and Considerations the Queen specially moving, and at the Petition of the said Earl, conveyed the same to the said *William* Earl of *Derby*, and the Heirs Male of his Body ; and for Default of such Issue, to the Heirs Male of the Body of the said Sir *George Stanley*, to be held of the Queen, her Heirs and Successors, by the Service of one Knight's Fee.

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That an Act of Parliament was made the Eighteenth of *November*, 4 *Jac.* 1. whereby it was Enacted, 'That the
' said *William* Earl of *Derby*, and the
' Heirs Male of his Body, and in De-
' fault of such Issue, then the Heirs
' Male of the Body of the said Sir
' *George Stanley*, should enjoy the last
' mentioned Premisses, and that the
' King should hold such Estate, Right,
' Title, Interest and Reversion, as if the
' Act had not been made.'

That the said Reversion descended from the said Queen to King *James I.* and that the said Reversion descended from him to King *Charles I.*

That King *Charles I.* the Eleventh of *July* in the Eleventh Year of his Reign, made an Award under his Privy Seal, That *William* Earl of *Derby*, and *James* Lord *Strange*, should grant a Rent-Charge of 600*l.* a Year, out of an Estate of sufficient Value, to *Charles Stanley* and the Heirs Male of his
Body,

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Body, and for Default of such Issue, to *James Stanley* and the Heirs Male of his Body.

That King *Charles I.* afterwards by Letters Patent the Third of *July*, 13 *Car. 1.* reciting the Letters Patent of Queen *Elizabeth*, the Act of Parliament, and the Award, and to enable the said *James Lord Strange* to perform the Award, granted the Reversion to the said *James Lord Strange* and his Heirs, to be holden by the same Services.

The King by the same Letters Patent willed and declared, that the said *James Lord Strange*, within a Year after the Date thereof, should cause the Reversion to be granted or limited, that the Lands, &c. should revert to the King in the same Manner as if the Letters Patent had not been made, chargeable nevertheless with a Rent-charge.

The Eleventh of *August*, 13 *Car. 1.* for Performance of that Award, by Indenture inrolled in Chancery, the said

La 4. Bridger,
M. R. case
of Cambridge
de Gaudin.

said Earl of *Derby*, and *James* Lord *Strange*, covenanted to convey within two Years the same Premisses by Fine, to the Intent the Rent-charge might be paid according to the Award, and that the Premisses in Question should go chargeable therewith to the Use of the said *William* Earl of *Derby* and the Heirs Male of his Body; and for Default of such Issue, to the Heirs Male of the Body of *Sir George Stanley* Lord *Strange*; and for Default of such Issue, to the Use of *James* Lord *Strange*, his Heirs and Assigns.

Twenty-first of *August*, 15 *Car.* 1. a Fine was levied of the Manor of *Lathom* to the Uses in the Covenant; and there were Proclamations thereupon.

That neither *James* Lord *Strange*, nor his Heirs or Assigns, did within one Year convey the Reversion, so as the Premisses might revert.

That Earl *William* was seised by Virtue of the Estate Tail, which descended
to

to the said *James Lord Strange*, and afterwards to *Charles Earl of Derby*, and afterwards to *William-George-Richard Earl of Derby*.

That *William-George-Richard* being so seised in Tail, made an Indenture, bearing Date the Eighteenth of *August*, 13 W. 3. and sealed and delivered the Thirtieth of the same *August*.

The Indenture is found in *hæc Verba*, and appears to be a Bargain and Sale for a Year, from the Earl of *Derby* to *John Thornton* and *John Hayes*, of the Manor of *Lathom*, the Capital Messuage and Demefne Lands, Park, Wastes and Rents of or in the said Manor, and all Lands and Hereditaments in *Lathom*, in the actual Tenure or Occupation of the said Earl, and divers Lands and Hereditaments in other Places, in Possession of several Tenants therein named.

That the said *William-George-Richard* Earl of *Derby* made another Indenture, dated the Nineteenth of *August*,

August, but first sealed by him the Thirtieth of *August*, the same Year.

This Indenture is found *in hæc Verba*, and appears to be a Release from the same Earl of the same Premises to *Thornton* and *Hayes* and their Heirs, in order to make them Tenants to the *Præcipe*.

That at the Time of Sealing the two Indentures, there were blank Spaces left immediately after the Words *John Harrock*, in order to insert the Names of other Tenants of Lands in the Towns mention'd in those Indentures.

That a Writ of Entry was sued out of the Manor of *Lathom*, &c. the Nineteenth of *August*, 13 W. 3. returnable the first Day of the next General Session of Assizes at *Lancaster*.

That the first Day of the next Assizes, (to wit) *Wednesday* the Third Day of *September*, 13 W. 3. the Writ was returned; the second Day the Earl, who is vouched and summoned, appeared,

peared, and vouches the Common Vouch-
chee, and thereupon a Recovery is suf-
fered, and the Demandants have Judg-
ment to recover Seisin; and pray a
Writ of Seisin, returnable on *Monday*
next in the same Session.

That on *Friday* the Fifth of *Septem-
ber* the Spaces were filled up with the
Names of several other Tenants of
Lands in the same Manors and Towns,
which Names were inserted by the said
Thornton, Party to the Deeds.

The Jury further find that *William-
George-Richard* Earl of *Derby*, being
so seised as aforesaid, of the said Re-
sidue of the said Manor of *Lathom*, and
the said two thousand Acres of Land
in *Lathom*, the said Manor of *New-
burgh*, two hundred and fifty Acres of
Land, Parcel thereof in *Newburgh* in
Lathom, of *New Park*, and of the Mes-
suage, and sixty Acres in *Lathom*, call'd
New Park, 2 *August* 29 *Car.* 2. in
Consideration of Five Shillings, made

E e

a Bar-

a Bargain and Sale for a Year to Heneage Lord Finch and others of *inter alia* the said Manor of Newburgh and New Park in Lathom.

That the Third of *August* the same Year, he made an Indenture of Release of the same Premisses to the same Parties and their Heirs.

The Release is found in *hec Verba*, and is *inter alia* of the Manor of Newburgh and New Park, to hold the same to the Trustees and their Heirs, to the Use of the Trustees and their Heirs, during the Life of *Dorothea Helena*, then Countess Dowager of Derby, in Trust to pay her a Rent of 600*l.* a Year Quarterly for her Life; and from and after her Decease, then as to the Manor of Newburgh and New Park, to and for the Uses of such Persons, for such Estates, and with such Powers and with such Remainders, as in and by the said Act of Parliament of the Fourth of King *James I.* is limited and expressed,

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expressed, and in such Sort and Manner as the same should have gone, if this present Settlement had not been made; and the said Earl covenants to levy a Fine to the Uses in that Deed.

That a Fine was levied accordingly the Twentieth of *August* 30 *Car. 2.* with Proclamations of (*inter alia*) the Manor of *Newburgh* and *New Park* in *Lathom*.

That the Manor of *Newburgh* and two hundred and fifty Acres of Land, Part thereof, lye in *Lathom*; that *New Park*, at the Time of the Settlement, 29 *Car. 2.* was Parcel of the Manor of *Lathom*, and was ever since reputed Parcel thereof; but both *Newburgh* and *New Park*, at the Time of the Settlement, 29 *Car. 2.* and the Recovery 15 *W. 3.* were in the Possession of *Dorothea Helena*, Countess Dowager of *Derby*, and the said Lord *Finch* and others the Trustees, at the same Times,

E c 2 were

were seised thereof for the Life of the said Countess Dowager.

They find that *William* Earl of *Derby* had Issue *James*, who had Issue *Charles*, who had Issue *William-George-Richard*, who died without Issue Male
4 Nov. 1702.

That the Defendant Earl *James* is Heir Male of the Body of *Charles*, and younger Brother of the last Earl *William-George-Richard*, and Great Grandson and Heir Male of the Body of the said Earl *William*.

That the Lessors, the Countess of *Anglesea* and Lady *Elizabeth Stanley*, are Daughters and Coheirs of Earl *William-George-Richard*; that on his Death they enter'd and made the Lease to the Plaintiff *prout*, &c. and whether the Defendant the Earl be Guilty as to these, the Jury submit to the Judgment of the Court.

Lord Chief Baron *Ward* was of Opinion with the Defendants, as to the Manor

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Manor of *Lathom*, &c. on the Stat. 34 H. 8. which restrains Tenant in Tail of the Gift of the Crown from aliening, against the Opinion of the other three Barons, who held the Intail in this Case was a fraudulent Contrivance, not within the Meaning of this Statute. The Case on the Statute of Mortmain was cited, as it appears in *Farmer's Case*, 3 Co. 78. b. and more largely in *Magdalen's College Case*, 11 Co. 73. b. 74.

As to the filling up the Blanks after the first Day of the Assizes, they all agreed, that being by Consent of the Parties, though the Words inserted might be void, it could not avoid the Deeds as to what was contained therein at the Time of Sealing; and besides, the Deeds had then done their Office, and made a good Tenant to the *Præcipe* for the Manor of *Lathom*, and what was comprised in the Deeds the first Day of the Assizes.

As

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As to *Newburgh* and *New Park*, Baron *Price* cited the Case 1 *Inst.* 324. b. that if a Lease for Life was made, the Reversion remains Parcel of the Manor, and passes with the Manor; which was not denied by any of the Barons, and seemed to be agreed by all; but they distinguished this Case, as being by Deed and Fine, and held it therefore a Discontinuance and a Temporary Severance, during the Life of *Dorothea Helena*, Countess Dowager of *Derby*; and therefore the Recovery was void as to these, for want of a good Tenant to the *Præcipe*.

And pursuant to this Judgment in Ejectment, the whole Manor of *Lathom* (except *Newburgh* and *New Park*, and except *Crossball*, which stood upon another Title) was adjudged for the Defendant, and therewith above 1000*l.* per Ann. in Leases for Lives have been held and enjoyed under this Recovery ever since, as Parcel of the Manor wherein

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wherein the Intail was barr'd by this Recovery.

The Authorities for the Reversions on Freehold Leases for Lives, remaining Parcel of the Manor, are very many, besides 1 *Inst.* 324. b.

B. and F. lease Part for Life, and then levy a Fine of the Manor, and the Reversion passed. 18 E. 3. f. 39.
18 Aff. pl. 2.

The Diversity, that after a Lease for Life of an Acre the Reversion remains Parcel of the Manor, and passes therewith ; but if the Manor be leased, except an Acre, the Acre is severed. 38 H. 6. f. 38.
Plowd. Com.
103. b.
2 And. 52.
1 Inst. 324. b.

So an Advowson appendant granted for Life remains appendant, and passes with the Manor or Lands to which it is appendant. Fitz. Brev.
919.
38 H. 6. f. 38.
5 Co. Ives's
Case.
2 Leon. 221,
& 281.

Theolal's Digest of Writs, f. 37. Cap. un. droit deuxfois demandé, 2 *Roll. Abr.* 58. *Grant*, Y 1, 2, 120, 121. *Manor D.* 1 *Roll, Abr.* 633. *Discontinuance*, B. 5. 26 *Aff. Pl* 55.

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And the Stat. 7 H. 8. c. 4. concerning Avowries for Rents and Services, seems built on this Foundation, that such Reversions are comprised and pass in Recoveries as Parcel of Manors.

And it seems owing to the Disuse of Real Actions that this comes now to be questioned.

N.B. Upon the Death of *William-George-Richard* Earl of *Derby*, Mr. *Starkey* of *Preston* was appointed by Earl *James*, and Mr. *Ward* by the Coheirs, to inspect the Writings and adjust their respective Rights to the Estates of the deceased Earl; and this Point, viz. That the Reversions on Leases for Lives passed by this Recovery as Parcel of the Manor, was agreed by them, and afterwards, upon a Reference to the Earls of *Pembroke*, *Rochester* and *Scarborough*, the same Point was admitted. And lastly, after the Judgment given in the Exchequer, upon a Reference to Mr. *Richard Webb* and others, whereby at last
all

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all remaining Disputes were settled between the Heir Male of Earl *William* and the right Heirs of the late Earl *William-George-Richard*. All the Manor of *Lathom* in Possession and Reversion, except *Croftshall*, *Newburg* and *New Park*, was awarded to the right Heirs, and the same have since been sold and enjoyed accordingly.

And note; The Determination by the Barons in the Case of *Newburg* and *New Park*, that the Fine in this Case made the Severance of these Parcels from the Manor, seems to imply that in other Cases where there is no Fine, there is no Severance, but the Reversion in Fee remains Parcel, and passes with the Manor according to the former Authorities.

PRECEDENTS of Rules for
Amending Recoveries.

Easter 34 Car. 2.

Wyrley.

Between *Richard Tregeare*,
Gent. Plaintiff, and *Ni-*
cholas Gennys, Gent. De-
fendant.

Of Tenements with the Appurtenances
in *Trewithicke Chapel Grounds*, *Chapel-*
Meadow, *Hendra Meadow*, *Twinna*
Waies, in the Parish of *Lanceston*,
St. Mary Magdalen la Witton, and *St.*
Thomas the Apostle, in the County
of *Cornwall*.

16 May. **F**Orasmuch as it appears to
the Court here, after the
Examination as well of the Plaintiff and
Deforciant, as upon the Inspection and
Exami-

Examination of the Fine levied between the Parties aforesaid, and the Indenture declaring the Uses of the Fine, that by the Omission or Misprision of the Clerk, who made and ingrossed the *Præcipe* and Concord of the same Fine, he supposed the said Tenements to lie amongst others in the Parish of *Lanceston*, when in Fact there is no such Parish within the whole County of *Cornwall*, but ought to be in the Parish of *St. Stephens* near *Lanceston*; it is order'd by the Court, that as well the *Præcipe* and Writ of Covenant, as all Entries and Records of the said Fine, in all Offices which it hath passed through, be amended and rectified by putting in the Words (*St. Stephens* near) as by Law it ought to be done.

By the Court.

Cooke.

Hillary 3 Anna.

Berrett.

*Courteney, Esq; against Blake
and his Wife.*

12 Feb. **U**PON reading a former Rule of the Ninth Instant *February* in this Term, made between the said Parties, and upon the Affidavit of *Nathaniel Lott*, it is ordered, that the Writ of Covenant in this Cause be amended by inserting these Words (and *Knowston*) in the aforesaid Writ, and that all Entries and Process made thereon be amended by the said Writ, according to the same Rule.

On the Motion of Serj. *Hooper*.

By the Court.

Cooke.

Hillary

Hillary 3 Anna.

Courteney, Esq; against Blake ^{Borrett.}
and his Wife.

11 Nov. **I**T is order'd that the Defor-
cients, upon Notice of this
Rule to them given, shew Cause to this
Court on *Tuesday* next why the Writ
of Covenant in this Cause should not
be amended by inserting therein (and
Knowston) and why all the Entries and
Proceedings thereupon made out by the
said Writ should not be amended.

By the Court.

Hooper.

The same against the same.

(To wit) **U**PON reading a former
9 Feb. Rule of 11 Nov. in
the last Term made between the said
2 Parties,

A Decree of Common Recoveries.

Parties, it is order'd that the Deforcients, upon Notice of this Rule to them given, shew Cause to this Court on *Monday* the last Day of this Term, why the Writ of Covenant in this Cause should not be amended by inserting (and *Knowston*) and why all the Entries and Processess thereupon made by the said Writ should not be amended according to the same Rule.

By the Court.

Gulstone.

Mich. 13 Car. 1.

*Drake and Another against
Biddulph.*

WHereas a certain Fine was prosecuted here in Court between *Anthony Biddulph*, Plaintiff, and *Anne Brown*, Widow, and *John Brown*, Deforcients, of two Messuages and one Garden,

Garden, with the Appurtenances in the Parish of *St. Albans* in *Great Wood-street*, *London*, in the Term of *Easter* last, that a Recovery thereof might be had of the aforesaid two Messuages and one Garden in the Term of the *Holy Trinity* last, and in the same Term the aforesaid *Biddulph*, by the aforesaid Fine being Tenant, appeared at the Bar here and vouched to Warranty the aforesaid *John Brown*, Clerk; nevertheless the Prothonotary in his Remembrance wrote and entred the *Præcipe* and Recovery aforesaid to be had of one Messuage and one Garden, and afterwards a Writ of Entry upon *Disseisin in le post* was prosecuted of one Messuage and one Garden, according to the Entry in the Prothonotary's Remembrance, returnable in the *Octave* of the *Holy Trinity* in the same Term, where it ought to have been of two Messuages and one Garden, according to the said Fine and Concord between the Parties aforesaid, and the
true

true Intention of them : Now upon the Affidavit of *George Almer* of the Truth of the Premises, and the Examination thereof in Court, in the Presence of the Parties aforesaid, and by their Consent, it is order'd by the Court, 20 *Octob.* that the Curfitor of *London* amend the Writ of Entry aforesaid, and make it of two Messuages and one Garden ; and that the Entry of the Recovery thereupon and other Procefs made out by the Clerk of the Prothotary be likewise amended.

On the Motion of *Serj. Heath.*

Hill.

Hill. 5 Anna.

Between *Edward Abney*, K^t. Cooke.

and *William Longueville*,
Esq; Plaintiffs, and *Henry*
Earl of *Clarendon* and *Ed-*
ward Hyde, Esq; Son and
Heir apparent of the same
Earl, Deforcients; and be-
tween *Anthony Heck*, Gent.
Demandant, *Edward Ab-*
ney, K^t. and *William Lon-*
gueville, Esq; Tenants; *Ed-*
ward Hyde, Esq; Son and
Heir Apparent of *Henry*
Earl of *Clarendon*, Vouchee.

Of Tenements in *Laverstoake*, *Pitton*,
Westgrimstead, *Alderbury*, *St. Martins*
Winterborne, *Earles* and *Pirton*, other-
wise *Purton*, otherwise *Puriton*, in the
County of *Wilts*.

11 Feb. **F**Orasmuch as it appears to
the Court here, upon the
G g Inspec-

A Treatise of Common Recoveries.

Inspection of a certain Indenture tripartite brought here into Court, bearing Date the Seventh Day of *February* in the Thirty-fifth Year of the Reign of the late King *Charles II.* made between the aforesaid *Henry* Earl of *Clarendon* and *Henry Hyde*, Esq; of the first Part, the aforesaid *Edward Abney*, Knt. and *William Longueville*, Esq; of the second Part, and the aforesaid *Anthony Heck* of the third Part, for declaring the Uses of the said Fine and Recovery, that the Names of the Places called *Clarendon* and *Clarendon Park* in the said Indenture mention'd, in which lies great Part of the Lands and Tenements agreed by the same Indenture to be comprised in the same Fine and Recovery, were omitted out of the said Fine and Recovery, by the Misprision of the Clerk who prosecuted the said Fine of the Octave of the Purification in the Term of *St. Hillary* in the above-said Thirty-fifth Year, and the said Recovery of the Term of *Easter* in that

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same Year ; and also upon reading divers Rules formerly made by the Court here, for adding the Names of Places omitted in divers Fines and Recoveries, it is order'd by the Court that the Cursitor of the County of *Wilts* amend the Writs of Covenant and Entry between the Parties aforesaid, by inserting in the said Writs, next after the Word *Puriton*, these Words (*Clarendon and Clarendon Park*) and also that all Parts of the said Fine between the Parties aforesaid, and the Recovery aforesaid, and the Exemplification thereof, and the Writ of Seisin between the said Parties, be amended on Record, in the same aforesaid Words (*Clarendon and Clarendon Park*) in all Places necessary.

On the Motion of Mr. Serj. *Brodbrick* and *Cheshire*.

By the Court.

Darby.

G g 2

Mich.

Mich. 6 Car. I.

Gulston.

*Skinner and Others against
Land.*

WHereas in the Term of *St. Hilary* in the Fifth Year of King *Charles*, upon a Writ of Entry upon *Disseisin in le post*, the Tenant vouched to Warranty *Arthur Gouldinge*, Gent. and *Anne* his Wife, of fifteen Acres of Land and one Acre of Meadow, with the Appurtenances in *Alphamston* and *Lamarsh* in the County of *Essex*: Now upon Inspection of the Feoffment made by the aforesaid *Gouldinge* and his Wife to the said Tenant, it appears that the aforesaid Acre of Meadow lies in *Great Henney*, and not in *Lamarsh*; and so the aforesaid Writ of Entry was prosecuted, by the Misprision of the Clerk, of Tenements in *Alphamston* and *Lamarsh*, and a Common
2 Recovery

Recovery thereupon ; and an Exemplification of the same was had, where it should have been of Tenements in *Alphamston* and *Great Henney* ; therefore it is order'd by the Court, that the Curfitor of the County aforesaid amend the Writ of Entry aforesaid, and that the Name of the aforesaid Village of *Lamarsh* be expunged by him, and in the Place thereof the Name of the Village of *Great Henney* be inserted ; and that the Prothonotary's Clerk also amend the Entry of the Recovery aforesaid, and the Exemplification thereof ; and also the Writ of Seisin prosecuted upon the Writ of Entry aforesaid, according to the said Writ of Entry aforesaid so amended.

By the Court.

Trin.

Trin. 13 Car. 1.

Gulston.

*Wightwick and Another
against Masters.*

UPON Inspection as well of a certain Indenture made between *Thomas Masters*, Tenant of the one Part, and *Humphry Wightwick*, Gent. and *George Wightwick*, Gent. Demandants, of the other Part, shewn here in Court for declaring the Uses of a Recovery here in Court, between the Parties aforesaid, had in the Term of *St. Hillary* last past, and also upon the Cognizance of the aforesaid *Thomas Masters* then present here in Court, it is found that that Recovery had should be of three Messuages, one Dovehouse, four Gardens, eighty-six Acres of Land, twenty Acres of Meadow, and fifty Acres of Pasture, with the Appurtenances in *Sibington*, *Newchurch* and *Marsham* in the County of *Kent*; but upon Oath of *William Codd*, one of the

the Attornies of this Court now present here in Court, it appears, that as well in the Writ of Entry of that Recovery had in the aforesaid Term of *St. Hillary*, as in the Writ of Seisin thereupon also prosecuted, and in the Entry of the Recovery aforesaid, the aforesaid Word *Newchurch*, by the Negligence of the Clerk, was intirely omitted; now it is ordered by the Court, the twenty-first Day of *June* in this same Term, that as well the Writ of Entry as the Writ of Seisin, and the Entry of that Recovery between the Parties aforesaid of Record be amended, and the aforesaid Word *Newchurch* in all of them be inserted, and that as well the Writs aforesaid, as the Roll of the Entry of Recovery aforesaid, be brought into Court here for the Purposes aforesaid, and amended here in Court, without Delay in this Particular.

On the Motion of Mr. Serj. *Clarke*.

By the Court.

Mich.

Mich. 1650. 2 Car. 2.

Present.

Fine between *George Parker, Esq;* and *Thomas Jolley,* Plaintiffs, and *Charles Cotton, Esq;* and his Wife, Deforcients.

Fine from the Day of the *Holy Trinity,* in three Weeks, 1649.

UPON the separate Oaths of the aforefaid *George Parker* and *Charles Cotton* made here in Court, and by Consent of the same *Charles Cotton* present here in Court, it is order'd by the Court this 19 Nov. that the Name of the Village of *Waterfall,* by the Negligence of the Writer omitted, be put in as well in the Writ of Covenant as in certain other Parts of the aforefaid Fine.

On the Motion of Serj. *G. Clarke.*

By the Court.

Gardner.

TABULA.

TABULA.

CAPUT I.

OF the Origine, Nature and Use of
Common Recoveries.

Concerning the Origine of Estates Tail, if
any among the *Romans* or *Jews*, invented
by the Feodal Law, and were first intro-
duced into *England* by the Conqueror.

All Estates at Common Law Fee-simple.

Statute of *Donis* created Estates Tail; the
the Mischief of these Estates, and the Rea-
son of it.

What Reputation Estate Tail had several
Ages.

Concerning the Origine of Common Recove-
ries, supposed by some to be begun by
Taltarum's Case, but rather to arise from
the Reasons drawn from *Oslavian Lombard's* Case.

The Recompence in Value, the Reason of
the Issue being barred, though only a Fic-

H h

tion,

T A B U L A.

tion, and this Fiction occasioned the learned
Cavils against Common Recoveries.

Common Recoveries bar where no Recom-
pence; as Tenant in Tail, Remainder for
Years suffers a Recovery, Remainder barr'd,
though Recompence cannot extend to a
Chattel; so Tenant in Dower and contin-
gent Remainders barred without a Recom-
pence.

Recompence in Value is the Reason for bar-
ring the Issue; but the Reason for barring
Remainders is, Recoveror is in of the E-
state Tail, which continues, and Common
Recoveries a Conveyance excepted out of
the Statute, and an inherent Privilege an-
nex'd to Estates Tail.

When Tenant in Tail is vouched, he comes
in of the same Possession he had before,
and to warrant it; and when one enters
into Warranty, the Law will always pre-
sume there was one on Feoffment or Grant.

Common Recoveries like Adversary Recove-
ries, and such Judgments, but Recoveries
on Title cannot be to a Use, as Common
Recoveries are. Recovery binds Blood
and disapproves the Title; though several
Discontinuances after Recovery, Recoveror
may enter; and though Recoveries reflect-
ed on by some Statutes, countenanced by
others.

T A B U L A.

The Use of Common Recoveries.
Common Recovery bars Issue, Remainders and
Reversions, and Recoveror comes in under
Tenant in Tail, and is liable to all his
Charges, and enlarges the Estate Tail; if
comes in as Vouchee, comes in of all E-
states; if is Tenant to the *Pracipe*, only
the Estate he then had is barred; for the
Recompence extends not to that he had not.
Where Issue has no Recompence not barred,
and therefore Recovery by Default with-
out Voucher binds him not, but on Entry is
remitted; but *aliter* where has or may have
Assets and Recovery in Value.
Are favoured and Fine, Recovery and Deed
to lead the Use one Conveyance.
Where Recovery is to be suffered by the Fa-
ther on Marriage of his Son, it is safest to
do it with treble Voucher.

C A P U T II. p. 20.

OF the Tenant to the *Pracipe*.
The Reason why there must be a Te-
nant to the *Pracipe*; if there is none, the
Issue in Tail may plead *Nient Tenant*.

T A B U L A.

If there be a good Tenant before the Return of the Writ, it is good; if were not Tenant at the Return, might abate it by Plea of *Non-tenure*; but if he vouches, he admits the Writ, but Vouchee may counterplead the Tenancy; but if he does not, it is good against them all by Estoppel, but than Tenant recovers not in Value, because lost nothing

If Tenant became Tenant after the Voucher, Judgment is given on the Voucher, not on the *Præcipe*, so binds.

In Common Recoveries if there be a good Tenant any Time before Judgment, it is good; and if comes to the Land by his own Act, cannot abate the Writ; *aliter* if by Act in Law, as Discent.

If there is no Tenant, the Demandant cannot sue Execution against him, nor he against Vouchee; and Estoppels, though of Record, bind not Issue in Tail; *aliter* of Tenant in Fee, a Recovery binds him, though no Tenant.

If an Estranger that has nothing is made Tenant with the True-tenant, it hurts not.

Lessee for another's Life makes a Lease for Years, and died, and he in Remainder, being Tenant in Tail, suffers a Recovery, and void, for Freehold was in Lessee for Years by Occupancy

Huf-

T A B U L A.

Husband Tenant for Life, Remainder to Feme in Tail, *Præcipe* against both ill; so if there be Tenant for Life, Remainder in Tail, *Præcipe* against both ill; so against Mortgagor and Mortgagee, because Land recovered in Value shall be in the same Degree as the Land lost.

Lands given to Husband and Wife, and the Heirs of the Body of Husband, Remainder over, Husband alone suffers a Recovery, it is no Bar; but if Husband discontinues, and *Præcipe* against Discontinuance, and Husband comes in as Vouchee, it is good to bar Baron, not Feme.

Concerning Tenant to the *Præcipe* by Disseisin.

Concerning Surrender by Tenant for Life to make a good Tenant to the *Præcipe*. If a Recovery be of a Manor, Part whereof is in Lease for Life, needs no Surrender; the Reason of this. *2. A. 2. 1. 1.*

Surrender by Tenant for Life must be to him that has the Reversion.

Term for Years hinders not Recovery; and by Statute of *Gloucester*, Tenant for Years in *London*, may falsify

Fine levied, and a Writ of Entry against Conuſee, and no Use declared of the Fine, yet a good Recovery.

T A B U L A.

Statute of *Frauds* extends to Trusts, not to Uses.

Recovery good without a Tenant to the *Præcipe*, where Party has a Fee.

Tenant to the *Præcipe* may be made by Fine, Release, Feoffment, Bargain and Sale inrolled, and though good before Inrolment, it is safest to inroll it before the Recovery suffered.

If Tenant to the *Præcipe* appear to be made by Release dated after the Return of the Writ, it is ill. Termor made Tenant to the *Præcipe*, extinguishes not his Term. Judges intend a Tenant to a *Præcipe* or Surrender, where Recovery of ten Years Standing.

C A P U T III. p. 60.

WH O may suffer a Common Recovery.
Infants cannot: Whereof the Privileges Infants have by Law.

If an Infant suffers a Recovery, either in Person or by Attorney, it is erroneous, but by Guardian by Privy Seal it is good.

Concerning the Disability of Coverture. Of the antient Form of Examination of a Feme Covert in a Recovery.

Common

T A B U L A.

Common Recovery by a Feme Covert, bars her Dower.

Lands given to Husband and Wife, and the Heirs of the Body of the Husband, he grants, a *Præcipe* against Grantee, the Husband is vouched, and vouches over, bars the Entail, not the Wife: But if Lands are given to Husband and Wife, and the Heirs of their Bodies, he discontinues and comes in as Vouchee, no Bar; so if Lands given to Husband and Wife, and the Heirs of the Body of the Husband, and *Præcipe* against him alone.

Lands given to Husband and Wife, and the Heirs of their Bodies, *Præcipe* against them, and they vouch Common Vouchee, good; so if to Husband and Wife, and Heirs of Body of the Wife; but if it be to Husband for Life, Remainder to Wife in Tail, *Præcipe* against both ill.

Husband and Wife Tenants in Special Tail before Marriage, Remainder to Husband in Tail Male, Remainder to J. S. in Fee, Baron grants, a *Præcipe* against Grantee, who vouches Baron; and doubted if barred for a Moiety.

Concerning Recoveries by Ideots and Madmen.

An Office finding one an Ideot *a Nativitate*, who had before levied a Fine, set aside.

Tenant

T A B U L A.

Tenant in Tail attainted, disabled to suffer a Recovery.

Alien, where his Recovery bars the Estate Tail, and where not.

The King cannot suffer a Common Recovery.

Women Jointresses disabled to suffer Recoveries by Stat. 11 H. 7. c. 20.

Feoffment to the Use of a Man and his Wife, and the Heirs of their Bodies, Man dies, having Issue B. Feme is disseised; B. releases to Disseisor with Warranty; and has Issue C. and dies; Disseisor suffers a Common Recovery, and vouches Feme; this bars not C.

A Man seised in Fee marries and has Issue a Son, his Wife dies, he marries again, and settles his Estate on himself, his Wife, and the Heirs of their Bodies, and dies; Mother and Son join in Recovery, bars the Heir.

Lands settled on Baron and Feme in Tail, Baron dies, leaving a Daughter, Feme *enseint* with a Son, Recovery by Wife and Daughter bars not the after born Son.

If a Man settles Lands with his Daughter in Tail, in Consideration of Money paid by the Husband, it is out of the Act; but if the Land be sold by Baron and Feme, and Lands purchased and settled, *aliter*.

Lands

T A B U L A.

Lands limited to a Man for Life, Remainder to his Wife in Tail, Remainder to a Stranger in Fee, out of this Act.

If Husband and Wife join, they may bar the Issue.

Baron seised *jure ux'*, they levy a Fine, and Lands rendred to them in Special Tail, he dies, she may by Fine bar the Issue.

If Land move from any Ancestor of Baron, within the Act.

By this Statute Recoveries by Tenant for Life void. Stat. 32 H. 8. c. 31.

Recovery at Common Law by Tenant for Life, bars him in Remainder, because the particular Estate and Remainder but one Estate.

Remainder vested in the King cannot be discontinued or pulled out of the King by Common Recovery; and such Remainder cannot be divested by Act of Party, but by Act in Law. Stat. 34 & 35 H. 8. c. 20.

If the King's Ancestor, not being King, makes Gift in Tail, this is out of the Act; so if Subject created an Estate Tail, and Reversion is granted to the King. If Tenant in Tail of the Gift of the King, make a Gift in Tail, the second Donee not within this Act.

T A B U L A.

If the King grant an Estate Tail and reserve the Reversion, and after he grants the Reversion, Recovery good, and bars all.

Where the Reversion is granted to the King for Life or Years, it may be barred; so wherever Reversion is severed from the Crown, and Privy gone.

Where King is Donor, and some little Alteration is made in the Entail by a private Act of Parliament, yet if Reversion continues in the King, it cannot be barred.

If the King procure Subject to intail Lands on his Servant, and it appears on Record, it is within the Act.

The Tenant in Tail must do or suffer, and bare Permission not within the Act; so Nonclaim on a Fine.

Stat. 14 Edw.
c. 8.

Hinders all Tenants for Life, in Possession or Right, from suffering Recoveries, or to come in as Vouchees.

C A P U T IV.

OF what Things a Common Recovery may be suffered, and what not.

Reputed Manor passeth Lands within a Liberty, and a Place known.

Of

T A B U L A.

Of a Rent, Pension, &c.

If a Man have a Moiety or third Part of Lands,
and suffer a Recovery of all, the Moiety or
third Part passes.

How a Recovery is to be suffered of Copy-
hold Estates.

Recovery of Lands in Antient Demefne.

Recovery of a Trust Estate good, without
Tenant to the *Præcipe*.

C A P U T V. *p. 100.*

THE Differences between a Common
Recovery with single and with double
Voucher.

If a Recovery be with single Voucher, it is
a good Bar of the Estate the Tenant in
Tail was possessed of, but no otherwise;
but if comes in as Vouchee, bars all E-
states he ever had.

T A B U L A

C A P U T VI.

WHAT is barred by a Common Recovery. *117.*

Recovery enlarges the Estate Tail, and lets in all Tenant in Tail's Incumbrances. *1120.*

Tenant in Dower, or Jointresses, who join in a Recovery, barred.

Tenant for Life, Remainder in Tail, he in Remainder leases to commence after the Death of Tenant for Life, and after Tenant for Life and Remainder-Man suffer a Recovery, the Lease is good.

If Tenant in Tail grant a Rent or Lease, Recovery makes these good.

Common Recovery bars contingent Remainders.

Bars not executory Devices or springing Trusts. *117. 134.*

Where there is no Estate Tail executed, Recovery bars not.

Bars not a Possibility or a contingent Executory Estate.

If one has an Estate for Life, with Power to make a Jointure; *aliter* of a collateral Power to make Estates.

Gift in Tail determinable on the Donees, paying 100*l.* Remainder to B. in Tail, Tenant in Tail before Day of Payment suffers a Recovery, all barred. Term

T A B U L A.

Term subfequent to an Estate Tail, as to rife, on Failure of Issue Male barrable; *aliter* if precedent Gift in Tail, rendring a Rent, the Rent not barred by a Common Recovery; but if Condition to re-enter, that barred.

If Issue in Tail comes in by Title Paramount, Recovery bars not.

A Man feised *Jure Ux'* for Life, Remainder in Tail to B. Remainder to C. Baron bargains and fells, and *Præcipe* against Bargainee, who vouches B. this bars the Entail and C. alfo.

Lands limited to B. and his Heirs as long as fuch a Tree ftands, barrable by Recovery, if Tenant in Tail levies a Fine with Proclamations, though Entail extinct, fubfequent Recovery good.

Bars a Remainder not *in Effe*, fo contingent Remainders.

C A P U T VII. *p. 142.*

OF Vouching and Recovery in Value.
Concerning Vouchers at Common Law,
and Counterplea thereof.

Where one may vouch himfelf.

Concerning Vouchers and Counterpleas in
Adverfary Actions.

T A B U L A:

Concerning Vouchers in Common Recoveries.

C A P U T VIII. *p. 153.*

OF Execution and the Estate the Recoveror has by the Common Recovery.

No Use arises till Execution returned.

If Tenant in Tail dies before Execution, it may be sued against his Issue.

Recovery lets in precedent Incumbrances.

Recoverors have the same Remedy against Lessees as Lessors had before the Recovery suffered.

C A P U T IX. *p. 156.*

OF Falsifying Common Recoveries.

By what Ways a Recovery may be falsify'd.

Several Cases of falsifying Adversary Recoveries.

Issue in Tail shall never falsify in the Point tried.

Who

T A B U L A.

Who may Falsify upon Stat. 25 H. 8. c. 15.
For what Causes a Common Recovery may be
falsify'd, and how.

C A P U T X. *p. 167*

OF Errors in Common Recoveries, and
in what Cases Recoveries and Fines
may be amended.

Several Cases where Court has amended Com-
mon Recoveries and Fines, or helped them
by a liberal Construction.

F I N I S.
